

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
THE CITY OF HUNTINGTON,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01362
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

	x	
	:	
CABELL COUNTY COMMISSION,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01665
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

BENCH TRIAL - VOLUME 39
BEFORE THE HONORABLE DAVID A. FABER, SENIOR STATUS JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

JULY 27, 2021

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Proceedings recorded by mechanical stenography;
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1 PROCEEDINGS had before The Honorable David A. Faber,
2 Senior Status Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 July 27, 2021, at 9:00 a.m., as follows:

5 THE COURT: Good morning, everybody.

6 SIMULTANEOUS SPEAKERS: Good morning, Your Honor.

7 THE COURT: I want to go over the schedule here
8 just to make sure that I understand it and we're all on the
9 same page.

10 The plaintiffs will take four hours today and rather
11 than break in the middle of their argument, we'll take a
12 late lunch. And they're reserving two hours for rebuttal.

13 AmerisourceBergen will do a two-hour argument this
14 afternoon. Tomorrow, we'll have Cardinal for two hours and
15 McKesson for two hours in the morning, take another late
16 lunch, and then come back for the plaintiffs' rebuttal. Is
17 that -- is my understanding on that correct?

18 MS. MAINIGI: That's correct, Your Honor.

19 MR. NICHOLAS: Yes, Your Honor.

20 MR. HESTER: Yes, sir.

21 THE COURT: All right. Mr. Farrell, are you going
22 to lead off here?

23 And I understand the mic is going to be down
24 temporarily, so keep that in mind.

25 MR. FARRELL: Keep my voice up.

1 THE COURT: Right.

2 MR. FARRELL: Good morning, Judge.

3 THE COURT: Good morning, Mr. Farrell.

4 MR. FARRELL: I have the honor today to speak on
5 behalf of Cabell County, West Virginia and, as you
6 mentioned, I will reserve for tomorrow a few personal
7 observations. Today is about business and tomorrow will be
8 more personal.

9 So, I wanted to start off with where we began not only
10 in the opening, but in the first witnesses at trial. And if
11 you'll recall, we called Dr. David Courtright as a witness
12 in this case. He was the second witness. And he was the
13 author. And he wrote the books about the opioids and public
14 policy. And he said something that I -- I think is poignant
15 for all of us to remember because this is an historic case.

16 What he said was, is that a historian is a person who
17 tries to tell a true story about the past based on primary
18 and secondary sources with an emphasis on primary sources
19 where they are available.

20 We endeavored throughout the last 38 days of trial, 40
21 live witnesses, 28 video witnesses, to present to you the
22 facts for you to assemble into the true story of what
23 happened in our community.

24 Distilling this down into some very basic fundamental
25 principles, what we have is, we have a number of puzzle

1 pieces. Some people begin with a puzzle by taking and
2 separating them into colors. Others break it out into
3 themes. Sometimes, we build the frame first. But what I
4 wanted to do was I wanted to get down to the very essence of
5 what our case is about and I drew up a formula as simple as
6 I could draw it up.

7 81 million pills distributed to a community of a
8 hundred thousand people or less isn't a substantial factor
9 in the opioid epidemic. It will cause an opioid epidemic.

10 I want to start with that premise. These three facts
11 on either side of the equal sign are undisputed in this
12 case. There is no one who will stand up and has testified
13 in this court that the number 81 million is wrong.

14 The data that we entered, that we subpoenaed the
15 federal government for, that we fought for for a year, that
16 we processed, that we brought to you in painstaking detail,
17 is undisputed.

18 You have also taken notice of the population of
19 Huntington-Cabell County. That's undisputed. And I would
20 venture to say on the right hand of the equation there's
21 barely anyone that will dispute there is an opioid epidemic
22 in Huntington-Cabell County, West Virginia. These are
23 facts, Judge. Now, the link between the left side and the
24 right side is where we spent most of the trial and most of
25 the debate.

1 So, sometimes what lawyers like to do is they like to
2 go through all of the evidence, witness, by witness, by
3 witness, and almost like with a score card, as a baseball
4 fan, go through each witness and say, well, this witness hit
5 a single. And this witness, he hit a home run. And this
6 witness struck out. And go -- if we were to do this for all
7 the live witnesses and all the video depositions, I'd
8 probably exhaust the entire amount of time that we have.

9 But instead, right up front, what I would like to do,
10 with your permission, is to present to you video clips of
11 two witnesses that were submitted for your review. And
12 those two witnesses are Nathan Hartle and Tom Prevoznik.
13 They're both very short clips and they go right to the heart
14 of our causation case.

15 And so, for a little bit of background, Nathan Hartle
16 was designated by McKesson as their 30(b)(6) designee. And
17 he was the very first witness that was deposed in this case.
18 The very first one.

19 On July 31st, 2018, I took his deposition in a 30(b)(6)
20 capacity and my colleague, who was here, Mr. Troy Rafferty,
21 took his deposition the following day, on August 1st, 2018,
22 in his individual capacity in regulatory compliance for
23 chain pharmacies.

24 MR. HESTER: Your Honor, I hate to object, but I
25 do need to raise the point we have a motion pending as to

1 Nathan Hartle and to exclude his testimony from this trial
2 and I just need to preserve the record, need to preserve
3 that point.

4 THE COURT: All right. The record will show your
5 objection. I'm going to allow him to do it, Mr. Hester, and
6 --

7 MR. MAJESTRO: Your Honor --

8 THE COURT: Mr Majestro? I'm sorry.

9 MR. MAJESTRO: Could we all just agree that all of
10 the objections that we've raised to evidence on both sides
11 are preserved so we don't disrupt each other over the course
12 of these closings?

13 THE COURT: Well, I think they are, Mr. Majestro.

14 MR. MAJESTRO: I do, too, Your Honor, and that's
15 why I would just like to let Mr. Farrell be able to continue
16 without any further interruptions.

17 THE COURT: Okay, Mr. Farrell. Go ahead.

18 MR. FARRELL: The second witness that we're going
19 to show is Thomas Prevosnik and he is the Deputy Assistant
20 Administrator of Diversion Control Division for the DEA.
21 And he was designated as the 30(b)(6) designee by the DEA on
22 a laundry list of specific topics by both the plaintiffs and
23 the defendants and was deposed over three days. Three
24 eight-hour days, we sat this nice gentleman in a chair and
25 asked him questions. I have a short clip from him, as well,

1 where I asked him five questions, a syllogism, if you will,
2 that takes us through the causal connections.

3 So, the first is Nate Hartle.

4 (Recording played in open court as follows)

5 If a wholesale distributor engages in unlawful conduct,
6 should it be held accountable for the societal costs of
7 prescription drug abuse?

8 I believe distributors have a responsibility in
9 preventing diversion.

10 Well, back to McKesson Corporation, which is you
11 sitting in the chair today. Knowing what you know as the
12 30(b)(6) representative, the corporate designee, knowing
13 about your past conduct, knowing about the past interactions
14 with the DEA, I'm going to ask you again: Does McKesson
15 Corporation accept partial responsibility for the societal
16 costs of prescription drug abuse in America?

17 Again, you know, I -- we're part of the closed system,
18 so we're responsible for preventing diversion.

19 So the answer is?

20 Again, I think we're responsible for something. I
21 don't know what -- how you define all societal costs and --
22 I still believe it depends on different circumstances.

23 Sir, we're not going to parse out percentages.

24 Yeah.

25 Let's just talk globally for McKesson Corporation. So

1 I don't want to put words in your mouth because it's got to
2 come out of your mouth. So, the answer is yes or no?

3 I would say yes, partially.

4 (Recording concluded)

5 MR. FARRELL: The second video clip is from Thomas
6 Prevosnick and I asked him five questions and he gives five
7 answers.

8 (Recording played in open court as follows)

9 Does the DEA take the position that the purpose of the
10 Controlled Substances Act and its federal regulations is to
11 prevent diversion?

12 Yes.

13 Does the DEA agree that diversion is foreseeable if
14 registrants fail to comply with federal law?

15 Correct.

16 And failure to comply enables more diversion. Does the
17 DEA agree with that?

18 Yes.

19 Does the DEA believe that more diversion is detrimental
20 to public health and safety?

21 Yes.

22 Does the DEA agree that the more pills which unlawfully
23 enter the market results in more diversion?

24 Yes.

25 (Recording concluded)

1 MR. FARRELL: So, Judge, respectfully, what we've
2 done in this case from July 31st of 2018 until you will see
3 here in April of 2019, we slowly built a record and we bring
4 this record to you and we believe that the record that we
5 have established has sufficient facts for us to meet all of
6 the elements of our case. These two witnesses are but a
7 piece of the puzzle that we've put together.

8 So, in essence, where we're at in summation, Judge, is
9 here. This is no different really than a jury trial, the
10 difference being you are both the finder of fact, as well as
11 making legal decisions.

12 Now, normally what would happen is that we would go
13 back in chambers with a court reporter and we would argue
14 for sometimes a day about the jury instructions. And then
15 we would submit them and, in fact, in the old days, you
16 would put down in the left-hand corner "accepted",
17 "rejected", or "modified", or "withdrawn", and you'd have
18 all of these checks on those boxes.

19 THE COURT: You did that in state court. I never
20 let the lawyers do that. I had ways to cut that short.

21 (Laughter)

22 MR. FARRELL: So, what we've had here is we've had
23 plenty of briefing, 12(b)(6), 56, 62(c). The law is the law
24 and I'm not going to dwell on it. I'm not going to spend a
25 lot of time. But I do want to point out a couple of key

1 components that summarize, from our perspective, the
2 elements that we're going to use.

3 So, jury instruction number 1, let's start with this.
4 And I think this addresses some of the questions that you
5 raised earlier and, you know, it's one of the things we
6 addressed when we first tried to understand public nuisance.

7 The term public nuisance is incapable of an exact and
8 exhaustive definition which fits all cases, because the
9 controlling facts are seldom alike, and each case stands on
10 its own footing. That's 1960, *Harless v. Workman*.

11 I want to direct your attention to this last part.
12 Each case stands on its own footing.

13 So, what's the footing that we stand on, right? What
14 -- where is it -- where are we coming from when we decide
15 that this is a public nuisance case?

16 And I'd like to make a reference to something that
17 Judge Goodwin said back in 2017 that caught my attention.
18 You're probably aware that your brethren has a few cases
19 with plea agreements and he's made some -- some opinions
20 that went all the way to the Fourth Circuit and this is what
21 he says: There is a clear, present, and deadly heroin and
22 opioid crisis in this community. West Virginia is ground
23 zero.

24 So, from this standing, this is the footing upon which
25 we're going to bring a public nuisance case. We have two

1 very good pieces of law for us to take a look at. The first
2 is general in nature.

3 And you'll recall that Judge Chambers, your brother in
4 Huntington, has *Sigman v. CSX*, a 2016 case, where he cites
5 and acknowledges *Hart v. Mountain Fork Lumber Company* from
6 1945. And in this it's three sentences. It's probably the
7 most cited reference in West Virginia law on public
8 nuisance.

9 And, Judge, if I may step down?

10 THE COURT: Yes.

11 MR. FARRELL: And what I'd like to do, and I know
12 I'm going to be off mic, but I'll try to raise my voice a
13 little here.

14 THE COURT: I'm hearing you just fine so far, Mr.
15 Farrell.

16 MR. FARRELL: 1, 2 and 3, three sentences, and I'd
17 like just to draw your eyes and your attention to a couple
18 of key things.

19 A public nuisance is an act or condition. So, we have
20 alleged the condition in this case is the opioid epidemic
21 and we've definitively defined it in the record as
22 addiction, abuse, morbidity and mortality.

23 Number two, there's a distinction between public
24 nuisance and private nuisance. We've briefed this. We've
25 talked about it. But this is really my first chance to make

1 some commentary on it.

2 You see, the individuals in the community have standing
3 to bring a cause of action on their own behalf on behalf of
4 their own damages. The County Commission and the city
5 government could bring a private cause of action for their
6 own expenditures. That's not what we've done here.

7 Rather, what we've done is rather than bring cases on
8 behalf of the standing of the individual, we've brought the
9 case on behalf of the general public because, as number 3
10 says, it is the duty of the proper public official to
11 vindicate those rights.

12 The next section is the Restatement of Tort (Second)
13 and, as you'll recall, there's a whole string cite where
14 federal and state courts have acknowledged that West
15 Virginia precedent follows the Restatement (Second) of
16 torts.

17 These are the elements that we tick off as we go down
18 our list of evidence. This is the framework of the puzzle.
19 This is the burden we have to carry.

20 And what it's my intention to do is, through a verdict
21 form, walk you through each of those elements and show you
22 in the record where we have established facts to support
23 your findings. That's my intention for today.

24 So, there are eight questions that I think are
25 pertinent. There may be more, right, but there are eight

1 that I think are a proper framework for us to address. And
2 I could sit here for an entire day and go through all of the
3 evidence.

4 Notably, you didn't make any findings of cumulative
5 throughout the trial. That's with kudos to my colleagues on
6 both sides. But there is voluminous evidence that you can
7 draw on.

8 So, question number 1, is there presently an opioid
9 epidemic in Huntington-Cabell County, West Virginia? Even
10 if everybody believes this to be true, we still have the
11 burden to come to you and prove it.

12 We could ask you to take judicial notice. We could
13 file admissions. But, in essence, we have to create a
14 record for you to check yes on this.

15 This is the evidence that we have put into the record
16 that we believe is undisputed. It's a heavy weight of
17 evidence.

18 Between 2015 and 2020, we presented the testimony of
19 Connie Priddy and through three exhibits, two entered by the
20 plaintiffs and one by the defendants, we've established
21 6,494 overdoses occurred in Huntington-Cabell County, West
22 Virginia. That's a population of less than a hundred
23 thousand people.

24 Through Dr. Smith, you'll recall Dr. Smith, Gordon
25 Smith, who is the Australian epidemiologist who is now at

1 West Virginia University. He didn't extrapolate. He didn't
2 study with numbers and take -- he went and studied himself
3 the number of fatalities in Huntington-Cabell County, West
4 Virginia. The gold standard.

5 I don't know of any other place in the country that has
6 gone into that much detail to document the overdose
7 fatalities in Huntington-Cabell County, West Virginia.
8 1,151 lost souls to the opioid epidemic.

9 We called Dr. Joe Werthammer. You will recall Dr.
10 Werthammer was a neonatologist and he was the one that came
11 in and talked about how they started with so many babies
12 that they had to divide out their neonatal unit between a
13 NICU and an NTU, a Neonatal Therapeutic Unit, Lily's Place,
14 and he testified that he estimates that today, in
15 Huntington-Cabell County, West Virginia, there are living
16 2,500 babies, young children born and diagnosed with
17 Neonatal Abstinence Syndrome. This is the group of young
18 children that we will be taking care of for the rest of
19 their lives in this community.

20 And then the final piece is the Opioid Use Disorder.
21 You heard from several different places, but as you recall,
22 Dr. Katherine Keyes, she was the epidemiologist from
23 Columbia, and she came in and she walked through the
24 methodology of what she estimated to be the number of people
25 that are currently suffering from Opioid Use Disorder in

1 Huntington-Cabell County, West Virginia.

2 Our population has dipped down since the 2010 census to
3 somewhere around 90,000. So, that's 8,200. That's almost
4 ten percent of the residents could be classified as
5 suffering from Opioid Use Disorder.

6 But not only did we present those facts. We also asked
7 the defendants themselves. We said, do you acknowledge
8 there's an opioid epidemic?

9 You heard perhaps some of the lawyers throughout the
10 case stand up and say nobody is disputing that there's a
11 problem in Huntington, but the lawyers aren't evidence. The
12 witnesses are.

13 We also brought in four different expert witnesses.
14 And then, if you look here, starting at the bottom left, we
15 presented evidence from a national perspective; the bottom
16 right, from a state perspective; the top left, from a county
17 perspective; and the top right from a city perspective.

18 And then we called witnesses, both in public health and
19 in public safety, who each testified.

20 Now, I could do this for all eight of the questions.
21 I'm only going to go into this much detail on the first one,
22 but we have actually documented for you by transcript record
23 and page the references to submit to the Court. For each of
24 the experts the question was specifically asked of them,
25 including the defendant's own expert.

1 We've submitted the documents. The first is the OIG
2 Report, which you probably have 15 copies of by now because
3 of the number of references to it.

4 This is the -- this is the historical overview.

5 You'll recall Dr. Gupta when he came into office. One
6 of the things he did was to document what was actually
7 happening in West Virginia.

8 The Resiliency Plan where the County and City and all
9 the healthcare providers and community leaders got together.
10 They have offered evidence that there's an opioid epidemic.

11 The City of Solutions with our mayor, who is here with
12 us today, they've put into record that there is an opioid
13 epidemic. So, we think definitively you can sit here and
14 say check yes to number 1. We got number 1 down, a check
15 mark yes.

16 I don't think there'll be much dispute, but when we go
17 through the rest of the questions, you'll see they are of
18 increasing importance. I staged them that way. And I'm
19 going to just highlight for the Court where I'd like to draw
20 your attention to make a definitive answer.

21 The second question, is the opioid epidemic a
22 significant interference with public health and safety?
23 Now, initially, we thought perhaps this was a legal question
24 because the defendants filed a 12(b)(6) and there has been
25 some argument, which was denied. This Court has said that

1 the -- that at least from a public health perspective it is
2 a public right.

3 But even if we get over the legal obstacle, which we
4 have, we nonetheless spent time in this courtroom
5 establishing a factual record to support your finding. The
6 first thing that you can reference is Congress itself, in
7 1970 -- as a side note, when I first began looking into this
8 case, the first thing that I did was I went and looked at
9 the U. S. Code. And in the very first provision, 801, it
10 has a statement that I probably could not have written any
11 better myself for this case.

12 The illegal distribution, among other things, of
13 controlled substances have a substantial and detrimental
14 effect on the health and general welfare of the American
15 people.

16 You can also go and look at the definition of "addict"
17 in the U. S. Code. In 802(1), the very first definition in
18 the Controlled Substances Act, it says that the addict means
19 any individual who habitually uses any narcotic drug so as
20 to endanger the public morals, health, safety, or welfare.
21 In Huntington-Cabell County, West Virginia ten percent of
22 our population is addicted.

23 We also put in testimony from Mr. Prevoznik from the
24 DEA. He makes a comment that filling suspicious orders is a
25 detriment to the public health and safety.

1 The testimony of Joe Rannazzisi, who came live to
2 testify, and what he said, that the failure to maintain
3 effective controls is an imminent threat to public safety.

4 We asked witnesses. You'll recall Chris Zimmerman, the
5 Senior Vice President from AmerisourceBergen. I asked him
6 specifically, do you acknowledge that the opioid epidemic
7 has had a devastating impact on public health and public
8 safety? He says yes.

9 Joe Werthammer, Dr. Gupta, and then even Dr. Gilligan
10 from Harvard, Women's and Brigham Hospital. And I want to
11 read to you the statement that I read to him because I think
12 this answers question number 2 in the affirmative.

13 Question, the magnitude, severity and chronic nature of
14 the opioid epidemic in the United States is of serious
15 concern to clinicians, the government, the general public
16 and others. Do you agree with that statement, sir? He
17 said, yes, I do.

18 Two more documents. The only medical literature that's
19 entered in the record at the defendants' request is from Dr.
20 Compton, the National Institute of Health, the 2019 article,
21 and he specifically references that the opioid epidemic is a
22 crisis in terms of both mortality and morbidity and
23 underscored the complexity of the public health, public
24 safety, and clinical response.

25 And then, finally, you have the Harm Reduction Plan

1 that the State of West Virginia entered.

2 The heroin and opioid epidemic is one of the great
3 public health problems of our time, period. That's a fact.
4 And, of course, this Court, last year, referenced that our
5 Former President of the United States has entered --
6 declared that the opioid crisis is a public health
7 emergency. I don't think that there's any reasonable person
8 that can say that number 2 is anything other than a yes.
9 Number 2 is a yes definitively in this record. It should be
10 undisputed.

11 Number 3, was diversion of prescription opioids a
12 substantial factor giving rise to and fueling the opioid
13 epidemic? What this is, is general causation, Judge. We
14 had to identify for the record the concept that what was
15 driving and fueling this opioid epidemic was the diversion
16 of prescription opioids.

17 And, as Joe Rannazzisi testified, a breakdown of the
18 closed system will cause diversion. Will cause diversion.
19 And he said on Volume 21, Page 178, Lines 2 through 4, when
20 prescription opioids are diverted, they're used illicitly.
21 People become addicted, people overdose, and people die.

22 In Joe Rannazzisi's first Dear Registrant letters to
23 the defendants, that's P-32 at Page 10, it says that the
24 dangerous and potentially lethal consequences of such abuse,
25 even just one distributor that uses its DEA registration to

1 facilitate diversion can cause enormous harm. I'm going to
2 come back to that word facilitate eventually.

3 I'm not going to read each of the question, but this is
4 a repeat. The five questions we asked the DEA, the five
5 questions in the record, April 18th, 2019, Page 641 through
6 643. Diversion happens in America and when the volume goes
7 up, the diversion goes up. And the more diversion there is,
8 the more dangerous it is to public health and safety.

9 Now, Your Honor, you could also check yes to number 3
10 just by using common sense and basic logic. As Nate Hartle
11 said in the very first deposition in the case, using common
12 sense and basic logic, you can assume the more pills that
13 are out there, the more potential for diversion there could
14 be, right?

15 But you don't have to guess because you will recall Dr.
16 David Courtright came in this courtroom and testified that
17 the historical record contains evidence from primary sources
18 that supply was a substantial factor giving rise to prior
19 opioid epidemics in the United States.

20 You'll recall, Judge Faber, that there were no
21 questions asked of Dr. Courtright. His testimony went in
22 uninterrupted. Un-refuted. And what his testimony here
23 says is that supply being a substantial factor is not just a
24 theory. It's a historical fact. It makes it foreseeable.

25 You also have from Harvard Medical School Dr. Gilligan.

1 His testimony, Page -- Volume 34, which is Day 34. At Page
2 181, Lines 19 through 20, he testified, there is a
3 significant amount of diversion and improper use of opioid
4 analgesics.

5 Now, to get to one final point, and I'm not going to
6 belabor this because it's technical, but it's important.
7 And I put it up front to make sure that I had enough energy
8 and focus to walk through this.

9 Dr. Gupta, when he was here as our Commissioner of
10 Public Health, published a series of reports and I have put
11 the P numbers that are all in evidence on this. These
12 reports that he walked through for a day and a half
13 definitively established what was happening with diversion
14 in West Virginia.

15 And I want to talk about the social autopsy for a
16 second. I feel as if this part of the testimony didn't come
17 in as clean as -- as I was hoping. It's because it's a
18 technical piece. He was being cross-examined on it. And
19 so, it wasn't a format. So, the record is in. You can read
20 this at P-44211. But I want to explain what he did.

21 Dr. Gupta wanted to figure out what was happening and
22 why people were dying from opioid overdoses. And so, he
23 went and identified every single overdose that happened in
24 the State of West Virginia in the year 2016, all 830 of
25 them.

1 And, in essence, what he did was contact tracing. He
2 went backwards in time with the help of all of his
3 colleagues to trace the history of each of those
4 individuals. And what he was able to determine was that
5 there was a significant percentage of those that died that
6 had prescription opioids in their system with no
7 prescription.

8 That is the seminal evidence, the first case in the
9 country to do that. Not a subset. He wasn't extrapolating.
10 He went and looked at every single overdose in West Virginia
11 in 2016.

12 So, the question number 3, was diversion of
13 prescription opioids a substantial factor? We have put on
14 sufficient evidence for this Court to find that nobody can
15 dispute that diversion is a substantial factor in the opioid
16 epidemic in Huntington-Cabell County, in West Virginia, and
17 in the United States.

18 Question number 4 is not typically a question that a
19 jury would entertain. This is a legal question. Do the
20 defendants owe a duty to maintain effective control?

21 I just want to make a couple of comments on this, on
22 stuff that perhaps hasn't had the emphasis to draw your
23 attention to at the end. Dr. Courtright testified, and it's
24 un-refuted, that the Controlled Substances Act reformed drug
25 policy in the United States creating one organic body of

1 law, which included a closed system to prevent diversion of
2 prescription narcotics. This goes to foreseeability.

3 The reason and purpose of the Controlled Substances Act
4 was to prevent diversion. And violation of the Controlled
5 Substances Act leads to diversion, an un-refuted historical
6 fact in the record.

7 This is -- this is another aspect that we've kind of
8 bounced around. What level of conduct? What's the
9 measuring stick for the conduct for the defendants?

10 Is it the Controlled Substances Act? Is it the CFR?
11 Is it negligence? Is it -- what is -- how do we measure the
12 conduct?

13 Well, I want to point out a couple of things because
14 this kind of dovetails into the remoteness argument, as
15 well. In 1983, *Robertson v. LeMaster*, my good friend, Bob
16 Fitzsimmons, continues to remind me this is the most
17 underused syllabus point in civil practice.

18 One who engages in affirmative conduct, and thereafter
19 realizes or should realize that such conduct has created an
20 unreasonable risk of harm to another, is under a duty to
21 exercise reasonable care to prevent the threatened harm.

22 So, in this context, Judge, the defendants, the
23 distributors, engaged in affirmative conduct by distributing
24 81 million prescription opioids into a community of less
25 than a hundred thousand people.

1 Now, just taking a step back, what do you think is
2 going to happen anywhere in America if you dump 81 million
3 pills of pharmaceutical grade heroin into a community of a
4 hundred thousand? It's not conjecture. It's a fact.

5 They were under a duty to prevent the threatened harm
6 of abuse, addiction, morbidity and mortality and they
7 failed. Their argument is that the injury that we're
8 alleging, the harm, the related harm of the opioid epidemic,
9 is too remote for them to be responsible.

10 Again, from West Virginia law in 1988, *Sewell v.*
11 *Gregory*, the test is -- the test is would the ordinary man
12 in the defendants' position, knowing what he knew or should
13 have known, anticipate that harm of the general nature of
14 that suffered was likely to result?

15 Again, what is that they knew and, if they didn't know,
16 should they have known was the nature of a general harm of
17 dumping 81 million pills of prescription opioids into a
18 community? How can anybody say that heroin is too remote of
19 a consequence after dumping 81 million pills of the same
20 molecule into a community?

21 The risk reasonably to be perceived defines the duty to
22 be obeyed, *Mallet v. Pickens*, representing Justice Cardozo,
23 that's *Palsgraf*. They would have you find that the related
24 harms are remote from the distribution of 81 million pills.
25 We would argue that they're direct and we'll get into that

1 more later.

2 Now, I'm going to fly through these because this is
3 still under duty, but I do want to make reference, and this
4 is for the Court, that in the DEA 30(b)(6) deposition the
5 DEA was asked two things.

6 One, they were asked, do you agree with the plaintiffs'
7 positions? And, two, do you agree with the defendants'
8 positions?

9 But, more importantly, we framed the questions in terms
10 of was this consistent with the advice that you were giving
11 to the defendants?

12 The record is replete with repeated statements from the
13 DEA and, Judge, I'm here to tell you that the positions
14 taken by the DEA are consistent with *Masters Pharmaceutical*.
15 Consistent with the MDL in Cleveland with Judge Polster.
16 They're consistent with Judge Breyer in San Francisco. And
17 they're consistent with every, every piece of legal ruling
18 you've made in this case and that the defense positions that
19 it has taken regarding the Controlled Substances Act in this
20 deposition have been repudiated.

21 In fact, I want to walk through precisely where one of
22 the conflicts is. You'll recall Chris Zimmerman. He is the
23 Senior Vice President for AmerisourceBergen. He testified
24 it's not our job to police the pharmacies. It's not our
25 job.

1 He testified that the duty that they have is only
2 imposed upon AmerisourceBergen while the pills are in their
3 possession. Diversion, to him, means I didn't have any
4 leakage from our warehouse.

5 He testified that they're responsible to make sure that
6 transportation company gets the pills from the -- from their
7 warehouse to the pharmacies.

8 And then, as you recall, I held up Joe Rannazzisi's
9 letter number 1 from 2006 and I read to him the passage. I
10 read to him the passage about due diligence to avoid
11 suspicious orders and his answer in Volume 8, Page 218,
12 Lines 19 through Page 219, Line 4, is that he doesn't agree
13 with the DEA's position in Rannazzisi letter 1.

14 Nonetheless, we believe that Your Honor was correct and
15 that the factual record supports your finding that the
16 defendants do owe a duty.

17 So, the next question, number 5, and I guess this
18 question we spent a lot of time on. Was the conduct by the
19 defendants unreasonable?

20 So, as you'll recall in the standing order that you
21 entered and in the briefing, there is a debate on what kind
22 of conduct is actionable. This Court has written an order,
23 and we agree, that the conduct that the defendants engaged
24 in will be measured by reasonableness.

25 And so, with that, if you look at the undisputed record

1 in this case of the volume of pills sold by the defendants,
2 it's -- it's more than 80 million pills.

3 Judge, I proffer for the Court and I say to you that on
4 its face, selling 81 million pills to a town of less than a
5 hundred thousand people, prescription opioids, is
6 unreasonable per se. I don't know of anywhere else in the
7 country that can show this tsunami of pills.

8 What I have also done with this is to support Question
9 5 with any permutation of any legal change. I have what we
10 call in state court special interrogatories, but in the
11 Federal Rules, they call them a special verdict. I came up
12 with a special verdict for you, Judge, and it has six
13 questions in it so that each of these six questions is
14 supportive of finding the conduct was unreasonable.

15 Now, make it clear, we don't have to prove all six of
16 these for you to find in our favor. You've just got to find
17 one. One on any of these six questions, we believe is
18 sufficient for you to find under public nuisance law of an
19 unreasonable interference. And I'm going to walk through
20 each of them.

21 Did the defendants unreasonably fail to maintain
22 effective control to prevent diversion? Now, I think this
23 answer we've established with the volume alone that the
24 answer is yes. It has to be yes.

25 But to illustrate this, I was thinking about the

1 findings of fact because, as you know, we've had teams of
2 lawyers on both sides working on these findings of facts and
3 conclusions of law but, ultimately, you're going to have to
4 write this order. And I think, I hope, I pray, that you
5 believe we've presented overwhelming evidence for this
6 statement to be true and you're going to have to fill in the
7 blank.

8 And there's -- various courts have used various words
9 and phrases, but you're going to have to come up with your
10 own synonym. So, I've got a couple for you.

11 The massive volume of prescription opioids distributed
12 by the defendants demonstrates failure to maintain effective
13 control. You could call it sheer volume, colossal volume,
14 mountainous volume for West Virginia mountains, staggering,
15 astronomical, obscene.

16 But here's the point, Judge. There's only one word you
17 have to use to make this finding and that's unreasonable.
18 We think you check yes to 5-a under any of these adjectives
19 on volume alone.

20 Now, 5-b, did the defendants fail to design and operate
21 an effective Suspicious Order Monitoring System? This is,
22 as some of my colleagues say, is when we got into the weeds,
23 went down a rabbit hole. But I want to spend a few minutes
24 talking about, just in general, a couple of things.

25 Judge, when you look at any one of the matrixes, it's a

1 series of transactions. The defendants have an obligation
2 under law to look at these series of transactions and
3 identify orders of unusual size, frequency or deviation from
4 a normal pattern.

5 What we've done in discovery is we've attempted to
6 apply their own rules. That's C -- that's D, E and F.
7 We've attempted to apply the rules that come from the
8 *Masters Pharmaceutical* case. That's A and B. And we
9 attempted to apply the rule that our expert witness, Jim
10 Rafalski, used in the *Mallinckrodt* case.

11 What we're suggesting to you, Judge, is it doesn't
12 matter which of these you use. And what's interesting is
13 that the defendants didn't rebut this by showing up and
14 applying their own matrix.

15 In fact, when they called their witnesses, their
16 algorithm experts, we asked them, did you apply the
17 methodology, the algorithm of the company that hired you to
18 come here today? And they said no.

19 They would poke holes in everybody else's algorithms,
20 but as I'm going to demonstrate, no matter which of these
21 algorithms we used, the patterns of the volume in this case,
22 the alarm bells should have been going off and, if the alarm
23 was not going off, then there's a design defect in their
24 program to begin with.

25 So, here's how we start it, and this is a point that we

1 probably tested your patience with, but it was necessary for
2 a very important reason. The systems the defendants were
3 using were nationwide and systemic. What that means is, is
4 that there was a corporate headquarter policy. There was a
5 single system and it applied to every distribution center in
6 America.

7 We put the volume, the page, and the line numbers
8 because we think this is an important fact that is
9 undisputed in the record.

10 When you look at the testimony of Joe Rannazzisi, he --
11 we've cited in the record each of the three companies'
12 testimony that documents that the administrative actions
13 that were taken were taken for systemic failures.

14 And then, finally, we showed that the defendants were
15 warned by the DEA. That's the black flags. And that each
16 defendant was sanctioned by the DEA. And we put the P
17 numbers in, which are the exhibits for you to look at
18 directly.

19 Another point for you to consider on their designs.
20 Each defendant, at some point in time, used a three-times
21 multiplier to flag suspicious orders. So, as you recall,
22 one of the things that I try to do is to use analogy and
23 experience to try to understand new concepts.

24 And this is the new analogy I have for you -- a hot
25 water tank. What -- what do you think your hot water tank

1 is set at in your basement? 110 maybe, right? There is
2 some level of hot water that is acceptable.

3 If you set your hot water tank's safety valve, then it
4 doesn't trigger unless it gets up to 330 degrees. You're
5 missing an entire range of some dangerously hot water.

6 That's what a three-times multiplier is. Their alarm
7 bells were set for a hot water tank to give people notice if
8 the water got higher than three times 110. And, as we'll
9 show you, the water got up to five times, six times, seven
10 times, eight times in the record. And if the alarm went
11 off, then somebody re-set it and shipped again the next
12 month.

13 This is another point that I think is a problem for the
14 defendants. It's undisputed in the record. Once the system
15 was flagged, they were under an obligation to freeze the
16 account.

17 And, Judge, I even pulled -- if you'll recall, Steve
18 Mays from AmerisourceBergen, he testified with this
19 document. This was the policy at AmerisourceBergen from '07
20 to 2014. And you'll recall we walked through the sequence,
21 the flow of events.

22 And once an order is flagged by the system, it is --
23 the system is designed to hold current and all future orders
24 from customers of like items. Once the fire alarm goes off
25 and the system is triggered, all further shipments are

1 supposed to be locked out until somebody comes in and does
2 due diligence and hits the re-set button.

3 This is why, when you look at some of the data that
4 we've put in, we can't find a whole lot of due diligence.
5 So, this is why, when you look at this compilation slide of
6 two different things, this is 44765 on the threshold, and
7 this is one of Craig McCann's charts.

8 This is SafeScript Pharmacy. Here's the date range.
9 Here's the volume by month. So, when you look at this, the
10 national average is somewhere around 5,000. If you take
11 three times 5,000, the line should be somewhere around here.
12 AmerisourceBergen shipped more than that to this pharmacy
13 repeatedly and there is no due diligence sufficient to come
14 in and say it was justified.

15 Some of these defendants used thresholds. This is the
16 threshold for SafeScript in the record. As of July of '07,
17 their threshold was 10,000 pills. What that means is the
18 algorithm should have shut down any pills above 10,000 in a
19 month and, as you can see, every month is in excess of
20 10,000 without any justification in the due diligence.

21 Furthermore, when you go down and look at the threshold
22 changes, somebody internally was raising the alarm level all
23 the way up to 45,000 pills a month before it gets triggered.
24 Perhaps they got tired of the fire alarm being tripped
25 repeatedly, and so they raised the threshold, but we don't

1 know because there's no due diligence.

2 The defendants are going to argue, oh, but there was
3 due diligence. We just didn't keep the records long enough.
4 We weren't required to keep the records long enough.

5 And as the DEA testified under 30(b)(6), that is an
6 argument they've heard before. And in the *Masters*
7 *Pharmaceutical* case, on Page 218, the DC Circuit Court not
8 only rejected that as an affirmative defense, they used it
9 as evidence that no such transaction occurred.

10 5-c and 5-d, I could spend all day on our matrices.
11 Right? These are the three matrices. But what I've done
12 instead is this.

13 I've made for Your Honor copies of my big board and
14 what I'm asking you to do is to take these back into
15 chambers, true and accurate blowups of the paper, stick it
16 on your big oak desk, and then look through it yourself.

17 Column 1 is the national average. Column 2 is the
18 state average. Column 3 is the county average. We then put
19 month, by month, by month, the transactions with pharmacies
20 in Huntington-Cabell County, West Virginia.

21 And then, just to show this wasn't an anomaly, but that
22 it was a systemic failure, we put all of the others over
23 here from around the region. And the defendants, what the
24 defendants' argument in this is, is not that any of these
25 numbers -- I want to get this right.

1 Their argument is not that these numbers are incorrect.
2 Their argument is, is that you shouldn't be allowed to see
3 outside of Cabell County. Let me say that again.

4 I'm not being pejorative about it. They're good
5 lawyers. I respect every one of them. It's the same
6 defense I would make.

7 They're not arguing that this volume is wrong. What
8 they're arguing is you should only look at this part. I
9 submit to you, sir, that if you look at just this part, you
10 can reach every conclusion supporting our case. And, when
11 you look at the rest, there's no doubt that this system, if
12 it was designed to trigger, then they were not operating it
13 as such.

14 So, I have P numbers. On one side is the hydrocodone.
15 On the other is oxycodone and with your permission --

16 Now, 5-e, the defendants argued that it has to be
17 reckless conduct, that they can't be held liable in public
18 nuisance unless their conduct is reckless. I guess they're
19 immune unless the conduct rises to the level of reckless.

20 Well, I've got three pieces of evidence, and I'm not
21 going to belabor the point, but this is probably the one
22 that I think jumps out at me immediately and that's because
23 it comes from AmerisourceBergen. And you'll notice it's the
24 Columbus division, Lockbourne.

25 This is the fellow in charge of regulatory compliance

1 for Huntington-Cabell County, West Virginia. That's his
2 job. And what he's talking about in 2012 is when SafeScript
3 got shut down by the DEA and he said, hey, you might want to
4 look at this.

5 But that's not why I bring your attention to it. I
6 bring your attention to it because of his signature block.
7 My signature block says, "Facts are stubborn things" from
8 John Adams. His signature block is from Pope John XXIII and
9 says, "See everything, overlook a great deal, correct a
10 little." If that's not the perfect argument for me to make
11 in closing of what happened here, the defendants saw
12 everything. They overlooked a great deal. And they
13 corrected very little.

14 Number 2, and this is a little more callous, but I put
15 it in here simply because this goes to heroin and related
16 harms. The defendants knew it. The lawyers make great
17 lawyer arguments. The defendants know heroin is a related
18 foreseeable harm from prescription opioids. And the reason
19 they know it is that, in this article, in this e-mail
20 string, P-16690, when you read it yourself, the article says
21 that prescription drug sales are plummeting and that heroin
22 deaths are rising.

23 That's what this e-mail string is doing. It's
24 forwarding that newsletter and this fellow says, good. Let
25 them move to heroin and meth. We don't have to monitor

1 that. Now, this goes to the people at the top of the chain,
2 including Michael Oriente, who took the stand.

3 And then, finally, for Cardinal Health, they identified
4 back in 2012, in P-2803(8), a particular pharmacy in
5 Huntington, West Virginia, The Medicine Shoppe, and in this
6 e-mail the Cardinal Health person said that there was a
7 black hole. And then I want to read into the record what
8 this says.

9 "This pharmacy has experienced significant growth from
10 the stimulant drug families and new pain clinic business.
11 QRA vetted the new pediatrician prescribing stimulants and
12 nothing significant appeared from a DEA license search."

13 And this is the next sentence. "A competitor in town
14 was raided by the DEA, which resulted in the arrest of a
15 non-pharmacist owner. The Medicine Shoppe has seen a
16 significant growth in both areas and, to my knowledge, a
17 site visit has not been conducted after submitting six
18 requests to validate growth and the information being
19 provided to corporate."

20 What they're talking about here is the SafeScript
21 getting shut down and the -- the people that were going to
22 the SafeScript are now going to the Medicine Shoppe. And
23 when you go and look at Cardinal Health's matrix and you
24 look at the volume here, you'll see that the people on the
25 ground were asking corporate to look into it and they sold

1 more pills.

2 This is like playing Whack A Mole for the DEA and
3 Cardinal Health knew it. They were sending requests for
4 somebody to validate this growth of this black hole and
5 nothing happened.

6 5-f, this is -- this is going to be my -- my favorite
7 portion of today's closing. Did the defendants
8 intentionally disregard the health and safety of the general
9 public in Huntington and Cabell County?

10 The defendants say that they have to have conduct
11 that's reckless or intentional. We say it's unreasonable.
12 I say you have ample evidence to answer this case in the
13 affirmative and you need to look no further than *Direct*
14 *Sales v. United States*. *Direct Sales v. United States*, this
15 is the case that was given to the defendants in 2005 during
16 the distributor initiative.

17 Sometimes my colleagues make fun of me for talking
18 about this old case so often. I'm going to talk about it
19 again. And I'm going to try to do my best, Judge, to get
20 your attention to read this case. And so, I've done a
21 couple of things to do that.

22 The first thing I've done is this. I have on loan --

23 THE COURT: What makes you think I haven't already
24 read it, Mr. Farrell?

25 (Laughter)

1 MR. FARRELL: See? That's good feedback.

2 I have here in my hand the original United States
3 Supreme Court Reports, Volume 319, and I put a tab in here
4 for *Direct Sales*. I'm hoping you'll read it from the
5 original book. This is a 1943 book.

6 Now, I'll leave it with your clerk, but I have to tell
7 you, we borrowed it from the WVU College of Law library.
8 And so, you'll have to return it eventually.

9 Can I approach?

10 THE COURT: Okay.

11 MR. FARRELL: Now, the second way I'm going to try
12 to get your attention is this. Do you see where I
13 highlighted who wrote the opinion, Wiley Rutledge? I don't
14 remember Wiley Rutledge. He didn't write too many opinions,
15 but he is notable because he's had two famous law clerks.
16 One of them is Jean Paul Stevens and the other is a fellow
17 named Dean Louis Pollak. He was the Dean of Yale while you
18 were there.

19 THE COURT: I picked him up in the rain and gave
20 him a ride home one night.

21 (Laughter)

22 MR. FARRELL: The other thing I wanted to point
23 out is, I wanted to point out from the *Direct Sales* case,
24 it's on appeal from South Carolina. It's on appeal from the
25 Fourth Circuit. And one of the three judges on the panel

1 from the Fourth Circuit was a man by the name of Judge
2 Elliott Northcott. Do you recall that name?

3 THE COURT: Yes.

4 MR. FARRELL: He was the West Virginia sitting
5 assignment and, as a matter of fact, he was the former city
6 attorney for the City of Huntington.

7 So, the quote that I put out here that you'll read in
8 the context is that it seems too clear for argument that Dr.
9 Tate, who was both the physician and the dispenser in this
10 case, could not have possibly used anything like the
11 quantity of morphine shipped by the wholesaler in his
12 legitimate practice as a doctor in a small town.

13 The Fourth Circuit used a word, another adjective, that
14 I think is more apt for us to insert into our colloquy here.
15 The volume, the Fourth Circuit said, was inconceivable.

16 So, getting back to up on appeal in the high court, I
17 pulled out three points. And the reason why I pulled these
18 three points out is because I think that not only does it
19 provide the framework for what happened, but it gives you
20 causation, as well as related harms.

21 The first quote, narcotic drugs have an inherent
22 capacity for harm and from the very fact they are
23 restricted, which makes a difference in the quantity of
24 proof required to show knowledge that the buyer will utilize
25 the article unlawfully.

1 In this case, it was a criminal conviction for
2 conspiracy based on the volume of pills sold by the
3 wholesaler to the dispenser. The United States Supreme
4 Court said that the knowledge -- it makes a difference
5 because this is the very nature of the -- of the narcotic.

6 Do you see the very first part? Inherent capacity for
7 harm, from the very fact that they are restricted. Provides
8 a basis that they have knowledge that that volume of pills,
9 the buyer would utilize unlawfully.

10 The second portion, and as you read this case, what you
11 will find is that some of the defenses raised here in this
12 courtroom were raised in *Direct Sales*. In fact, the
13 wholesaler in that case said all we have to do is make sure
14 that the guy we drop it off for has his Harrison stamp, his
15 Harrison narcotic stamp, and then we're done, just like the
16 defendants in this case have said all we have to do is make
17 sure the pharmacy has a DEA registration.

18 What the United States Supreme Court found was there is
19 no legal obstacle to finding the supplier not only knows and
20 acquiesces, but joins both mind and hand with him to make
21 its accomplishment possible.

22 And in what perhaps is the best statement on causation
23 I can think of, the primary effect of this volume of pills
24 in this case by the United States Supreme Court, the primary
25 effect of the conduct is to create black markets for dope

1 and increase illegal demand and consumption.

2 We think you can answer all six questions in the
3 affirmative. It takes us to 6.

4 Now, this is a specific causation. What this is, is
5 some dispute of whether an oversupply by the defendants had
6 related harms. That's a technical defense that they've
7 raised and they're not arguing in the opposite. They
8 haven't put any proof it's not true. They're just saying
9 that we can't prove it.

10 Well, we wrote a question and we asked our expert from
11 Columbia. We put into the record, do you have an opinion
12 whether the volume sold by these three companies would be a
13 substantial factor giving rise to and fueling the opioid
14 epidemic and its related harms? And she said, yes. My
15 opinion is that it's a substantial contributing factor.

16 We also asked the same question of Dr. Gilligan. So,
17 you have Harvard and you have Columbia. And Dr. Gilligan
18 frankly testified consistently with Dr. -- with Columbia,
19 with Dr. Keyes. And what he said is that I think if there
20 are a large number of medications prescribed in any area,
21 there will be some of them that will be diverted, misused,
22 abused.

23 And so, that there would be some incidence then where
24 that diversion, leading to misuse, abuse, there would be
25 some instances where that would lead someone to initiate

1 heroin.

2 And this is the -- this is the part that grabbed my
3 attention. I think that would be statistically likely in
4 any area with a large number of opioid pain medications that
5 were prescribed. There is no other place in America that
6 has more prescriptions per capita than in Huntington-Cabell
7 County, West Virginia and, if there is, then we rank up near
8 the top.

9 Dr. Gupta said the same thing. You'll recall he used
10 the flooding analogy. He said that this area was flooding
11 and that we were doing all that we could, but we were
12 drowning. And he made a poignant remark at the end. We
13 were drowning and we didn't open the floodgates, which is a
14 theme I will return to tomorrow.

15 And then, in the last question of the last witness that
16 I asked a question of, Dr. Colston, I asked Ms. Colston, my
17 understanding is that you take the position that an
18 oversupply of prescription opioids is not the causal factor
19 of the opioid epidemic, but is only a causal factor? And
20 she said that's correct.

21 And under Professor Cady's tort exam, it reminds me
22 that all we have to prove is that it is a causal factor and
23 not the causal factor. So, we think the record undeniably
24 establishes number 6 in the affirmative.

25 Now, this is question number 7, is the opioid epidemic

1 abatable? And this is where perhaps I'm hoping to engage
2 you because what we are trying to establish is that this
3 epidemic is abatable. Judge, we can make a difference.

4 Dr. Alexander testified this is not a moonshot. We put
5 on evidence and you heard from the people in our community,
6 boots on the ground that are dealing with this every single
7 day, and what they're doing to try to piece together grants
8 and funding and what works for them.

9 We've also overlaid on top of that from the leading
10 expert in the country, from Johns Hopkins Bloomberg School
11 of Public Health a plan. And he says we can do it if we
12 provide treatment programs.

13 The expert from Harvard agreed. The expert from
14 Harvard testified on Day 34, Page 179, Lines 28 and --
15 through Page 180, Line 4. Dr. Gilligan agrees with the
16 statement that closing the path to Opioid Use Disorder will
17 require addressing overprescription of legal opioids,
18 reducing the availability of illicit opioids, and getting
19 patients with Opiate Use Disorder into treatment.

20 This is important, Judge, because based upon the social
21 autopsy, what Dr. Gupta found is that 81 percent of the
22 people that died from a drug overdose of opioids in 2016 had
23 interacted with our healthcare system.

24 The point we're trying to make here, Judge, is we can
25 reach them. We've designed an evidence-based treatment

1 program that can make a difference. We have the
2 infrastructure and the people in our community are willing
3 to do the work, which leads us to number 8, our abatement
4 plan.

5 As you'll recall, the abatement plan has four aspects
6 to it. We have an economist come in and put a number on
7 each of the categories. You'll recall that the largest
8 section of it is Section 2-b., 1.7 billion for treating the
9 Opioid Use Disorder. And you'll recall that the only real
10 debate with this is the number because Dr. Rufus, from the
11 defendants' own expert, he said that we don't need that
12 much. We only need 644 -- 644-million worth, not the 1.7
13 billion.

14 And as you'll recall, Mr. Majestro asked him, so you're
15 saying that the appropriate number is somewhere between 644
16 and 1.7 billion? Now, I have a personal opinion on where
17 you should land between the two but, ultimately, what we're
18 trying to do is we're trying to create treatment programs
19 that we can make a difference and save lives and we can be a
20 shining example in our community and the nation on how to
21 get out of this problem.

22 Category 3 is public safety. We've put in on what we
23 need to keep our community safe.

24 Category 4 is the supporting special individuals.

25 So now, my dismount, as I tell people, before we take

1 our break.

2 The defendants are going to make summation arguments
3 and talk about the standard of care. They're going to talk
4 about statutes.

5 Well, let me back up because, see, Dr. Courtright
6 testified on the second day of trial about the historical
7 life cycle of the opioid epidemic and I'd like to come back
8 and re-visit it because what this is, is the foreseeable
9 outline of what the defendants are arguing.

10 This is what Dr. Courtright said. Well, it starts off
11 with an increase in incidence, large number of new cases,
12 and it continues to grow. And then, there's a public
13 reaction to that. There's concern. There's newspaper
14 stories like Eric Eyre's Pulitzer Prize winning story.

15 There are angry speeches in Congress like when the CEOs
16 testified in Congress. There are papers that are given at
17 professional meetings by physicians exploring the increase
18 in something like morphine addiction.

19 And there's a reaction. And the reaction leads to
20 reform, both within the medical profession and, also, often
21 statutes to deal with the problem.

22 Judge, this is not new. The defense is foreseeable.
23 This is the foreseeable life cycle when you open Pandora's
24 Box and you let out the opium. It has consequences. It's
25 toppled governments.

1 81 million pills into the community and this is what
2 happened. It got people's attention. It got Congress. It
3 got newspapers. It got reform. A change in the standard of
4 care.

5 What we're suggesting, Judge, is the un-refuted
6 testimony is that everything they've said is completely
7 predictable and it's why the Controlled Substances Act was
8 written the way it was.

9 The second thing the distributors are going to do is
10 they're going to try to -- they're going to say, Judge,
11 we're just one aspect of the whole opioid epidemic. I've
12 made a black hole of puzzle pieces to try to demonstrate an
13 image for the opioid epidemic and what the distributors
14 initially do is they try to sever their connection to the
15 opioid epidemic. That's the first defense that they've
16 done.

17 They've asked you to throw the case out for intervening
18 and superseding cause. We don't believe -- and they have
19 the burden to show that. And we don't believe that they've
20 established their burden of proof for either of them. What
21 their arguments are, are remoteness, that it's not
22 foreseeable that dumping 81 million pills into a community
23 of less than a hundred thousand is going to have adverse
24 consequences. We don't believe that this is credible.

25 The second thing that they do is they're going to say,

1 okay, if we are responsible for the entire opioid epidemic,
2 so are a bunch of other people. And they blame the
3 manufacturers, and bad doctors, and good doctors, and
4 pharmacies, and the State of West Virginia, or the Board of
5 Pharmacy, the Board of Medicine, PEIA, the FDA for approving
6 the daggone stuff and the DEA.

7 But, Judge, two comments on this. Number one, the
8 distributors are the only ones in this case and they didn't
9 file cross-claims against any of them. And the law, as it
10 stands, if you follow Judge Moats at the MLP and you accept
11 on the face value the rejection of the writ of prohibition,
12 it doesn't matter if there's anybody else with substantial
13 fault because it's joint and several liability and they
14 should know it.

15 So, if that is the case, there is a contingency plan.
16 The contingency plan for the defendants is to try to sever
17 the indivisible harm.

18 THE COURT: Judge Copenhaver didn't buy that last
19 argument you made in his City of Charleston case. How is
20 that different from your situation here?

21 MR. FARRELL: Let's back up. He didn't buy that
22 they were --

23 THE COURT: That -- that the other actors in the
24 picture -- well, if I understood his opinion correctly, he
25 held that the fact that there were other causes and other

1 actors preempted the liability or made -- did away with the
2 liability of one of the actors; is that right? Did I read
3 the case correctly?

4 MR. FARRELL: So, I will have to come back and
5 piece it together. What we are talking about are the remand
6 cases from the State of West Virginia back to Boone?

7 THE COURT: Talking about the opinion he wrote.
8 And I had it in my hand awhile ago and I didn't bring it in
9 here.

10 MR. FARRELL: So, Mr. Majestro is my legal expert.
11 Are you talking about the remand where the doctors were
12 severed?

13 MR. MAJESTRO: Talking about the City of
14 Charleston.

15 MR. FARRELL: I'm going to defer to Mr. Majestro.

16 MR. MAJESTRO: Your Honor, I think I can answer
17 the question. A very quick answer to that.

18 Yes, Judge Copenhaver did that. With respect to the
19 claims against the particular defendants in that case, the
20 Joint Commission, he specifically noted in that case, this
21 case is not like the cases that the counties brought in 51
22 and specifically distinguished the Cuyahoga County and
23 Summit County case, which is identical and on four -- all
24 fours of this case.

25 THE COURT: Okay.

1 MR. FARRELL: Yes. He said that it is too remote
2 for the JCHO. We think that, nonetheless, if you want to
3 put JCHO into this bucket, there has to be the same analysis
4 done for each of these defendants and that's the burden of
5 the defendants in this case, not us.

6 So, if they want to allocate fault, they have to do two
7 things. One is, they have to show it's divisible. And then
8 they have to meet their burden of proof on cross-claims and
9 they haven't.

10 So, as a result, if as a contingency they are on the
11 hook, if you do find liability and you do address the opioid
12 epidemic as an indivisible harm, then their backup plan is
13 to try to sever out of it a particular piece of pie and that
14 is why they've stuck so hard onto the gateway theory.

15 They're trying to exclude from the opioid epidemic that
16 they're responsible for all things heroin and
17 fentanyl-related. They're trying to separate that. That's
18 their main goal.

19 So, that's why, Judge, the first witness we called in
20 this case was Corey Waller. That's the first time he had
21 ever testified. He's the only expert you qualified in this
22 case on neuroscience.

23 And he testified about the structure, function and
24 outcome of the morphine molecule. You will recall his tag
25 lines. A molecule is identical. The brain doesn't know the

1 difference between hydrocodone, oxycodone and heroin. And
2 the outcomes are the same, addiction, overdose and death.

3 And this is followed up by Dr. Kerri Keyes. You'll
4 recall Dr. Keyes put on the entire record in the affirmative
5 as to what the gateway effect and how it's established in
6 known epidemiology.

7 And then you will recall Dr. Gilligan. And I don't
8 want to belabor the point, but I went through Dr. Gilligan,
9 his testimony, and I grabbed out a couple of quotes. And
10 I've got them here and I can read them all into the record.

11 He says on Page 152, "Although the vast majority of
12 prescription opioid exposure does not lead to heroin use,
13 heroin incidence and prevalence rates were significantly
14 greater among those who reported non-medical prescription
15 opioid misuse", end quote.

16 You asked a question at some point in time about
17 whether or not this is going to apply to people that started
18 on heroin without ever seeing prescription opioids. We
19 asked Dr. Gilligan that question and what he said was only
20 one percent of the population abusing non-medical
21 prescription opioids started with heroin. He said people
22 who used heroin prior to non-medical use prescription
23 opioids was one percent. That was Page 153.

24 Page 154, four out of five heroin users began with
25 abusing prescription opioids.

1 On 178, again, remember, we had that thing with the
2 kilograms versus deaths. He said 80 percent of the people
3 talking heroin started with prescription opioids.

4 On Page 171, he said for every death, you could expect
5 ten treatment admissions, 32 emergency department visits,
6 130 people who abuse or are dependent, and 825 non-medical
7 users.

8 On page 178, he said those suffering from OUD shift to
9 heroin because it is more accessible and less expensive.

10 Judge, what I'm proposing to you is this. The
11 defendants would have you either find them too remote in
12 their conduct to be responsible, or have them share
13 responsibility, or have you carve out some small sliver that
14 they're responsible for.

15 And what I'm here to say, Judge, is that we have
16 established a record. We have done what we promised we
17 would do 38 trial days ago. And there is one opioid
18 epidemic and what we're asking for is your help. We have
19 the workers. We need the funding.

20 So, with that, Judge, I conclude my comments today on
21 behalf of Cabell County. That's the work we put in. And,
22 tomorrow, I'll have a few personal comments I've held back.

23 So, after this break, my colleague, Ms. Anne Kearse, is
24 going to step up and she has the voice of the City of
25 Huntington and those that live in it. Thank you for your

1 time.

2 THE COURT: All right. This is a good place to
3 take a ten-minute break.

4 (Recess taken)

5 (Proceedings resumed at 10:45 a.m. as follows:)

6 MS. MAINIGI: Your Honor, if I may just be
7 heard before Ms. Kearse begins.

8 Your Honor, we have heard Mr. Farrell mention several
9 times in his closing that he intends to save part of his
10 argument, part of his statements, including his personal
11 statements, for tomorrow. And we think that is absolutely
12 improper.

13 Mr. Farrell's rebuttal needs to be limited, and I think
14 this is well established, limited to rebutting whatever the
15 defendants' arguments happen to be today and tomorrow. He
16 can't save an entire part of his closing statement for later
17 in the day tomorrow because, among many other reasons, we
18 obviously would not have an opportunity to then respond at
19 that point.

20 So we object to that. He's obviously noted it. We
21 obviously are fine if he wants to add to his closing
22 statements either now or after Ms. Kearse. But we certainly
23 would be objecting to him raising tomorrow that which he
24 could have raised today.

25 THE COURT: Well, is this going to be rebuttal

1 tomorrow or what do you anticipate they're going to say?

2 And he says "yes."

3 MR. FARRELL: Yes, Judge. I'm aware of the Rules
4 of Civil Procedure.

5 THE COURT: All right. Well, he's on notice now,
6 Ms. Mainigi.

7 MS. MAINIGI: Thank you, Your Honor.

8 THE COURT: All right, Ms. Kearse.

9 MS. KEARSE: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MS. KEARSE: I understand the mics are still not
12 lapel so --

13 THE COURT: Well, so far I'm hearing you
14 adequately.

15 MS. KEARSE: Okay, great.

16 Your Honor, on behalf of the City of Huntington and --
17 I want to take this time today, in addition to Mr. Farrell,
18 to talk about the -- to drill down more on the community
19 harms with that.

20 But the City of Huntington and Cabell County together
21 have brought before Your Honor a single cause of action, and
22 that's the public nuisance, against these three companies
23 here today with one remedy of abatement of the public
24 nuisance.

25 Your Honor has heard, as Mr. Farrell showed you

1 earlier, from a number of witnesses that includes the
2 community. They include members of the City of Huntington.
3 They include members of Cabell County. They include
4 institutions of WVU and Marshall and various law
5 enforcement, public health officials, and people on the
6 ground who actually witnessed first-hand the opioid crisis
7 in Cabell County and City of Huntington, and also have
8 studied the opioid crisis in City of Huntington.

9 Your Honor, in addition to the witnesses, the documents
10 have appeared from your bench there. But you have a
11 mountain of, of exhibits that I imagine the law clerks are
12 having fun with as well.

13 But in those documents, you know, today I hope to shed
14 light on a couple of those documents. But they're so, so
15 numerous, as Mr. Farrell indicated, that I think our
16 findings of fact that will follow these arguments will be
17 very, very detailed as well into what are in those
18 documents, but I'd like to highlight a few of those today.

19 Your Honor, you've heard the evidence and we submit to
20 Your Honor that we have demonstrated the City of Huntington
21 and Cabell County are still in the midst of an opioid
22 epidemic.

23 They've been harmed by defendants' failures to maintain
24 effective controls to prevent the diversion of prescription
25 pills into their communities, and the public health and

1 safety of the community has been significantly interfered
2 with the rise of this public nuisance.

3 And the City of Huntington and Cabell County are well
4 positioned to implement an opioid abatement plan and a
5 response to the public nuisance, address the crisis in the
6 community.

7 Your Honor, today, as an advocate but also a voice in
8 the community, I want to go through some of the testimony
9 today because it's important for Cabell County and City of
10 Huntington that their testimony was heard in this courtroom
11 and the record is made for your Court's consideration.

12 Simply put, we believe the evidence presented
13 demonstrates that the fact that the health, safety, and the
14 welfare of these communities are at stake, but we believe
15 there's a pathway to recovery.

16 Mr. Farrell went over some of the expert testimony
17 there, but I want to start with the exposure of prescription
18 opioids as the driving force of the public nuisance. The
19 accessibility and over-supply that is in the record of
20 prescription pills have ravaged this community and it's
21 undisputed that the more pills that are out there, the more
22 potential there is for diversion.

23 Mr. Farrell played clips today for Your Honor so
24 they -- the first one and the third one were actually played
25 for you by video deposition and the designations that you'll

1 have before you. And also you've heard from Dr. Keyes.

2 But I want to take it a step further now from the, from
3 the DEA and from the experts there and talk about our
4 community and what they were seeing and the extent of the
5 diversion on there.

6 You'll remember the first -- one of the first weeks we
7 called Dr. Gupta. And Mr. Farrell referred to Dr. Gupta
8 again today. And I asked Dr. Gupta about the, the public
9 health and, and the exposure to prescription opioids in the
10 community with that.

11 Dr. Gupta was very clear. Opioid addiction is a matter
12 of public health. Through this trial, witnesses have
13 focused on the public health and public safety of a
14 community based on public nuisance to show the interference
15 that the opioid crisis has had on their community.

16 The plaintiffs called Dr. Gupta. And I asked Dr. Gupta
17 to educate the Court a little bit about public health since
18 this is going to be well-founded in public health principles
19 and, and safety.

20 Public health is fundamentally the art and science of
21 designing strategies, actions, aspects that help lead to the
22 prevention of disease, promotion of health, as well as those
23 strategies ultimately that would provide high quality both
24 prevention, surveillance, and treatment in terms of
25 addressing long-term public health problems, as well as the

1 most pressing contemporary public health problems in a broad
2 definition.

3 And I think this is important, Your Honor, as we carry
4 through with, with the, the evidence that's before you and
5 as we move towards our proposed abatement plan.

6 But I asked -- I also asked him, "Can addiction be a
7 public health matter?"

8 "Addiction is a public health matter."

9 "How is addiction a public health matter specifically
10 to opioids?"

11 "Whenever any condition is causing West Virginians to
12 die every year by double percentage increase, that issue
13 becomes a public health matter, period. The reason that
14 people were using drugs and dying of overdose is because of
15 the addiction."

16 Your Honor, opioid addiction has been a driving force
17 to the opioid crisis in Cabell and Huntington.

18 In addition to Dr. Gupta, every local witness that came
19 before Your Honor explained that the opioid epidemic and the
20 addiction was widespread throughout Cabell and Huntington.
21 And I'd like to take a little bit of time and just refresh
22 Your Honor with some of the witnesses. Some of them were in
23 the first week.

24 You'll remember Jan Rader, 27 years on the City of
25 Huntington. She brought her medic bag with you [sic] and

1 showed you about the Narcan on that. And Jan Rader is not
2 with us today. She's at the International Firefighters
3 Convention actually.

4 THE COURT: She told me firemen still rescue
5 kittens from trees.

6 MS. KEARSE: On a good day, they get to do that,
7 yes, Your Honor.

8 And Chief Rader oversees six stations, 88 firefighters.
9 And, and she told you -- we'll go through some of the
10 testimony about that. But one of the things as, as to the
11 widespread community harms I wanted to focus on on that,
12 "Chief Rader, when you and your firefighters and other first
13 responders are going out on overdoses, is it throughout the
14 community?"

15 "It's everywhere."

16 She's been to restaurants where working -- workers,
17 clientele, doctors' offices, dentists' offices, been to the
18 park. She and her 88 firefighters who carry naloxone on
19 their cars and the police with naloxone have been everywhere
20 within the community overdoses. Nobody is immune from it.
21 She's seen overdoses from as young as 12 and as old as 78.
22 There's no boundaries.

23 Again, sometimes you look over and there's a four- or
24 five-year-old watching to revive their patient (verbatim).
25 She told you about going to overdoses of the classmates and

1 her friends, pervasive in the community.

2 She also testified, Your Honor, on that Friday about
3 how her -- she and her men and other community members would
4 be comforting families of overdose victims and testified
5 about the ripple effect.

6 And the ripple effect is important as we talk about the
7 community health and the community fact that addiction is a
8 public health matter, as Dr. Gupta testified on that. She
9 testified it's widespread and a lot of carnage.

10 You remember Connie Priddy who testified the day before
11 Jan Rader. And she talked a lot about the QRT. But both
12 she and Chief Rader talked about the number of overdoses
13 they were going on.

14 Connie Priddy testified that 95 percent of the
15 overdoses that she goes on are opioid-related. And Ms.
16 Priddy testified that there's no typical overdose person.
17 Really, it cuts across every socioeconomic line.

18 Our team will tell you that they have sat in an
19 apartment with a dirt floor, a mattress, and they sit in
20 million-dollar homes. It cuts across gender. It cuts
21 across race. It cuts across every socioeconomic line.
22 There is no typical person of the overdoses.

23 You heard on another Friday from Chief Holbrook. Chief
24 Holbrook was a life-long resident of, of Huntington until he
25 went down to Columbia, South Carolina, where he is now.

1 But the opioid epidemic went from one end of the city
2 to the other. It really affected people from all walks of
3 life. It didn't matter where you were, who you knew, where
4 you lived, what color your skin was, or how much money you
5 made. People were focused on fueling their addiction.

6 Again, Chief Holbrook testified, "What I saw during my
7 time as a Police Chief was something that really has
8 affected me profoundly. There was not one person through
9 some connection, there was no degree of separation by the
10 time I left Huntington that a friend, family, neighbor had
11 not been touched by this problem, had not lost a loved one,
12 had not reached financial ruin because of their efforts to
13 address an addiction problem with a loved one."

14 Plaintiffs called Scott Lemley. This is similar to
15 Chief Rader. You heard throughout the testimony in a
16 small-knit community of Huntington and Cabell County you
17 couldn't get away from going places and actually seeing your
18 friends, seeing your classmates, and seeing your family.

19 Scott Lemley, who was a crime analyst who does all the
20 data gathering for the City of Huntington and the Mayor's
21 Office of Drug Control Policy, also was asked about the
22 geographical nature and the widespread community harms that
23 opioid addiction had.

24 Again, it was persuasive throughout the entire city.
25 It varied, very young, very old. From a race standpoint, it

1 generally followed the demographics. But it went from
2 teenagers to 70-year-olds and made it difficult to address
3 and went through the entire community.

4 And Dr. Yingling, Associate Professor at Marshall
5 University and Chairman of the Board of the
6 Cabell/Huntington Health Department, testified the related
7 harms of addiction have cut at every core of the fabric of
8 our community. They have jeopardized many in our community.

9 This should not be in dispute, Your Honor. There's
10 been widespread harm throughout the community, throughout
11 all socioeconomic, throughout race within the City of
12 Huntington and Cabell County.

13 Mr. Farrell actually showed you this one earlier. This
14 is Chief -- this is Mayor Williams's forward within the City
15 of Solutions that we'll talk more about that you've seen
16 throughout the trial, again reiterating the fact that every
17 community is being harmed and, more importantly, that the
18 families, neighborhoods, and epidemic is a
19 non-discriminating disease.

20 Presence of pills. Diverted prescription opioids
21 infiltrated the City of Huntington and Cabell County. And
22 the diversion of opioids into the illegal markets create a
23 massive demand. The enormous quantity of pills shipped
24 helped show that diversion was occurring.

25 There was abundant evidence, Your Honor, throughout the

1 trial that as the pills came in and pills were seen by the
2 community, there also began to be an intertwining of heroin
3 abuse, a reasonably foreseeable event to the defendants as a
4 matter of law, history, science, and basic common sense.

5 As the breaches of diversion were occurring in the
6 closed system, impact was bubbling on the surface of these
7 communities.

8 The first responders were seeing a change. We talked
9 about Chief Rader, a Fire Chief -- a firefighter since 1994.
10 She saw an occasional overdose, occasional death. Most of
11 the time she testified it was the alcohol [sic] that someone
12 would know on the corner, the alcoholic.

13 Sheriff Zerkle talked about in the early days as a
14 police officer, they didn't see deaths. They didn't see
15 bodies. They didn't see what subsequent years and resent
16 years have seen.

17 Again, Chief Holbrook testified they were also seeing
18 an incredible volume of finding people in possession of
19 prescription pills.

20 Jan Rader testified, "We started seeing overdoses. And
21 at these scenes, we would see pill bottles, oxycodone,
22 hydrocodone typically."

23 Sheriff Zerkle testified, "Huntington was flooded with
24 pills. We had an overwhelming amount of prescription
25 opioids being dispensed in our county."

1 And Mayor Williams testified, "It became apparent to me
2 the heavy abundance of opioid pills being distributed within
3 the community had heroin -- and heroin."

4 Scott Lemley testified as well to the fact that when
5 they were doing their work and gathering information on drug
6 seizures that he did for the HPD, he would see Oxycontin,
7 Opana, Roxy 30 as examples in the seizures that the HPD were
8 getting of diverted drugs, prescription pills, opioids, and
9 more prescription pills.

10 This is boots on the ground and there's ample evidence
11 that we'll provide of additional documents and testimony
12 supporting the eyewitness testimony in addition to what the
13 experts concluded in epidemiological studies of City of
14 Huntington and Cabell County.

15 We also had reports from the -- you'll remember, Your
16 Honor, I did show some of these in, in opening. But we
17 actually went through these with the witnesses, particularly
18 Skip Holbrook and Scott Lemley, with what the HPD and the
19 reports were putting out into the community.

20 2011 the HPD, Huntington Police Department, annual
21 report, emerging threats. Currently the most prevalent
22 emerging threat to our community is the illegal diversion of
23 powerful pain medications such as oxycodone and oxymorphone.

24 In 2012, currently there are two emerging threats;
25 first, illegal diversion of powerful pain medications such

1 as oxycodone and oxymorphone, and the second was the growing
2 use of heroin which has contributed to a significant rise in
3 overdose deaths.

4 At that time, West Virginia was second in the nation
5 for prescription overdose deaths.

6 The threat assessments also, in addition to the HPD
7 reports, also talk about the diversion and abuse of
8 prescription drugs in our region as an epidemic and the
9 tragic cost to our communities. It's a community issue
10 overburdening law enforcement, adding to prison population,
11 overwhelming treatment facilities, and undermining the
12 employability of work force and, most important, devastating
13 families. Again, a public health crisis in Cabell County
14 and City of Huntington.

15 In 2012 oxycodone seizures alone increased by
16 1,773 percent from 2010 totals.

17 Many people who have developed opioid addictions due to
18 abuse of prescription medication turn to heroin. This is
19 from the folks on the ground seeing this. It's not expert
20 testimony, but what they're seeing in their community.

21 Many people who have developed opioid addictions due to
22 abuse of prescription medication turn to heroin due to the
23 lower price, 30 to 80 dollars for a prescription pill
24 compared to 20 to 25 for a dosage unit of heroin. Boots on
25 the ground.

1 What it did to the public health and public safety of
2 our community is clear through these reports. The vast
3 majority of property crime offenses investigated by the HPD
4 are directly related to the drug trade.

5 Most theft is perpetuated by individuals addicted to
6 drugs and in need of a means to support their habit.
7 Therefore, any successes we experience in drug enforcement
8 and treatment initiatives will positively affect property
9 crime trends.

10 And we'll go -- there's more of these too but, again,
11 all of our drug reduction efforts must include collaboration
12 with other law enforcement agencies, as well as those
13 agencies focused on addiction, treatment, and education, a
14 core part of our case, a core part of our abatement plan,
15 Your Honor.

16 2014 you'll remember Chief Holbrook testifying about
17 his letter to the Mayor with that. But two years later
18 they're still seeing a growing number -- growing use of
19 heroin as the number one threat now in the City of
20 Huntington.

21 The influx of heroin into the area over the past few
22 years has contributed to a significant rise in overdose
23 cases.

24 You'll remember Chief Holbrook testifying that this
25 report was the most important document he wrote to the

1 Mayor. It outlined in detail the greatest threat to ever
2 face our community, a pervasive drug culture and associated
3 crime. Exhibit 41527 will be in detail with Your Honor with
4 that.

5 But Chief Holbrook testified I saw -- he saw his town
6 being decimated by the addiction. He saw the addiction
7 explode. He saw the seizures explode. And the pill
8 seizures were going up and the overdoses were going up. We
9 were also seeing property crime go up.

10 The diversion and abuse of controlled pharmaceutical
11 drugs, particularly opioid-based pain relievers, will
12 continue to be the most serious threat to Huntington, 2014.

13 Although there's been an emergence of cheaper
14 alternatives such as heroin, diversion of abuse of
15 prescription drugs continues to pose a threat to our city.
16 The most commonly diverted pharmaceuticals in our area
17 continues to be narcotic analgesics such as oxycodone,
18 hydrocodone, and methadone.

19 Again, the cost associated with the supply and demand
20 for prescription opioids was occurring. And the opportunity
21 for cheaper alternatives was being made as a heroin
22 significant threat. The lower cost of heroin compared to
23 the price of pharmaceutical drugs has created a significant
24 problem for drug enforcement.

25 Chief Holbrook actually specifically talked to

1 diversion and what he was seeing within the City of
2 Huntington and Cabell County. Oftentimes, especially with
3 diversion, an investigation would start with a call on a tip
4 line, a pharmacy calling, a traffic stop, and finding
5 prescription pills in somebody's possession that they had
6 not seen -- or not have a legitimate prescription, or one
7 would have multiple pharmacies or doctors that they had been
8 to.

9 You'd see evidence of what they looked like, maybe a
10 pharmacist or a doctor again, distributing prescription
11 drugs and opioids irresponsibly.

12 And the threats go on, Your Honor, about the direct
13 results of the prominent prescription drug trend in
14 Appalachia. The abuse and the availability of heroin will
15 continue because of the high levels of prescription drug
16 abuse. The availability preference and demands for
17 prescription drugs, primarily opioids, has laid the
18 foundation for the heroin market; again, Chief Holbrook,
19 boots on the ground.

20 The heroin distribution and abuse in Huntington grew
21 significantly in 2013. And, again, this is a direct result
22 of the predominant prescription drug threat in Huntington.

23 Your Honor heard from the Mayor. You heard from Chief
24 Rader. You heard from Scott Lemley and others in the
25 community about the rising levels of overdoses and addiction

1 and what was next.

2 Chief -- Mayor Williams testified if you name the
3 problem, you own it. He felt like he had to do something
4 aggressive. Serious level of addiction in our community and
5 we need the people to join together.

6 Your Honor has heard about the various reports. And
7 these -- I would put these as some of the milestones within
8 the community to come together as starting in 2015, 2014,
9 and then into the other things with the Mayor's Office of
10 Drug Control Policy.

11 I show these to you, Your Honor -- we'll go through
12 some of these things here because this was a community
13 responding to the crisis. This was a community looking at
14 the crisis not only from a law enforcement, but also from a
15 medical area of addiction with that. And we'll go through
16 some of the things.

17 But these programs are also -- we went over in detail
18 with you to show you that not only has the city and county
19 come together, but they are familiar with the issues. They
20 have an infrastructure in place and a partnership in place
21 that many community members talked about with that.

22 The strategic plan. You heard from, from Chief Rader
23 who talked about one of their missions was to deal with the
24 addiction issues.

25 Scott Lemley, "We had to look at the data." They

1 looked at the data. They gathered the data. They had to
2 work with the data to see what is really percolating here
3 and how we're going to respond to it.

4 The strategic plan encompassed hundreds of meetings and
5 over thousands of hours. They went out into the community
6 and talked to law enforcement. They talked to medical
7 communities. They talked to numerous people in the
8 community in order to put a plan together on behalf of the
9 community and with the community's help with that on there.
10 They spent hours of time speaking and people hearing about
11 opioid addiction and the consequences of such.

12 You saw two strategic plans. And the purpose in the
13 2017 was -- the purpose of this report is to provide a new
14 two-year strategic plan outlining the Mayor's Office of Drug
15 Control Policy key efforts in suggesting its continued
16 commitment to the opioid crisis.

17 Three areas of focus: Prevention, treatment, and
18 recovery and law enforcement.

19 Mr. Farrell mentioned that in the portion of the data
20 gathered that they had in 2017 they reported that they
21 were -- 10 percent of their population were addicted to
22 opioids. Huntington and Cabell and Wayne counties was
23 facing an epidemic.

24 Again, the Mayor's Office of Drug Control Policy aimed
25 to improve its efforts in three key areas of prevention,

1 treatment, and recovery and law enforcement.

2 Areas that the community came together to work on was
3 to divert people with drug addiction into treatment and to
4 help them re-enter society once in recovery; reduce the
5 incidence of Neonatal Abstinence Syndrome; prevent the
6 spread of blood-borne pathogens; expand programs for
7 outpatient treatment; develop treatment and recovery
8 programs for women and children; streamline the
9 stakeholders' efforts and data; and reduce drug trafficking.

10 This is a city and county, Your Honor, that came
11 together and put out strategic plans to identify what issues
12 that they had and try to deal with them the best they could.
13 They gathered data to show the influx of opioid addiction
14 and the impact on crime.

15 Mayor Williams testified that the mission is not
16 accomplished. Their strategic plans laid the foundation and
17 the framework for the community to be able to come together.
18 And what came out of these plans was really a community
19 coming together.

20 Jan Rader talked about the fact that when they went out
21 there to see who was where and who was doing what and bring
22 the partnerships together, this laid the foundation for the
23 City of Solutions. It laid the foundation for the community
24 to work together. It laid the foundation for the programs
25 that we talked about to deal with the opioid epidemic at

1 that time.

2 Again, Your Honor, these, these two documents -- you
3 heard testimony from Lyn O'Connell about the resiliency
4 plan. You saw various drafts of the resiliency plan, of
5 Cabell County coming together on a forward-looking, what are
6 we going to do today and tomorrow, and the City of
7 Solutions.

8 What have we done? What did we learn as we came
9 through the Mayor's Office of Drug Control Policy? What did
10 we learn from the community on there about opioid addiction
11 and drug addiction and the solutions on there?

12 These are cornerstones to our infrastructure of being
13 able to carry out future plans.

14 We asked Lyn O'Connell -- you remember Lyn. I think
15 she was on the stand for three days, Lyn at Marshall
16 University who at the addiction services has worked very
17 closely with the City of Huntington and Cabell County and a
18 very pillar of the community.

19 "Does the community have the foundation and the
20 infrastructure to do what it needs to do?"

21 "The groundwork is there. We're standing on solid
22 foundation right now. We have the community partners.
23 We're uniquely situated because as a community, we chose not
24 to bury our heads in the sand and acknowledge our problems.
25 But, rather, we're living in an epidemic."

1 Mayor Williams also testified about the partnerships
2 and the coming together. And as he testified, there's a
3 formula that works in his mind and is very simple. It's
4 that collaboration leads to partnerships. You collaborate,
5 you start to create partnerships. Then you establish a
6 level of trust. The outcome, not the tactic, the outcome
7 ends up being hope. Again, this is coming together from the
8 opioid epidemic they're still dealing with today.

9 Some of the experts that Mr. Farrell -- I want to touch
10 on a couple of things of, of how we get here. We just
11 talked about the boots on the ground as they were seeing the
12 percolation of the pills there.

13 We brought Dr. Smith. If you remember, Dr. Smith was
14 from New Zealand, a WVU epidemiologist. Dr. Smith spent
15 time as he went through files to look at data. And you
16 remember he had two different types of data that he was
17 reviewing. He had CDC data, and then he had to go through
18 data that was before 2000 to see the trends of overdoses of
19 addiction.

20 And you'll recall his testimony that it was almost
21 stunning to him that before 19 -- 1999, I think he used that
22 year or 2000, he did not see any overdoses. He saw some,
23 but there was very, very limited on that.

24 To me, the most important thing on the slide -- I'm
25 going to show -- this is a demo slide. The heroin was not

1 much of a problem. And as you can see, the red line of the
2 prescription opioids, that's all you saw was the dramatic
3 rise in prescription opioids over the same period of time.

4 And during this period of time, there was very little
5 heroin certainly being found in people who were dying. And
6 it's important as we see the transition as we heard from the
7 witnesses, as we heard from the experts, the drug in force
8 to the opioid epidemic was prescription pills.

9 Dr. Smith testified about his data. Before 2000, only
10 76 drug cases per year in West Virginia from 1979 to 1999.

11 2001 to 2016, drug poisoning deaths in Cabell County
12 alone 14 of 16 were opioid-related.

13 From 2001 to 2016, 1,002 opioid-related deaths in
14 Cabell County representing 90 percent of all the related
15 deaths in the county.

16 And 2001 to 2018, the rate of opioid-related poisoning
17 deaths in Cabell County soared from 16.6 to 213.9 percent,
18 one thousand -- one hundred thousand between 2001 and 2017.

19 Dr. Smith also talked about a medical article that we
20 showed Your Honor that he had brought in his expert
21 investigation. 2008 JAMA was an article that actually
22 looked at a study that looked at 2006 deaths in West
23 Virginia.

24 So we went to the social autopsy that we heard Dr.
25 Gupta talk about in 2006 where they went through all the

1 death certificates.

2 In 2008 there was a study, the Hall study that did a
3 similar thing, looked at the 2006 overdose deaths.

4 And the studies showed that 295 overdose deaths, 186,
5 63 percent, were associated with pharmaceutical diversion.
6 And another 63, 21 percent, showed evidence of
7 doctor-shopping. 275 to 295, 93 percent, showed opioid
8 analgesics taken, but fewer than half had been prescribed.
9 Again, prescription opioids causing harm to the communities.

10 2008 Social Autopsy, and then we had the 2016 Social
11 Autopsy.

12 Dr. Smith testified about his various data search and
13 his conclusion. And I believe Your Honor even asked him a
14 question about this, about present day, what he sees with
15 prescription opioids.

16 My conclusion from reading the literature, looking at
17 my own reports, and what I found was that there is very,
18 very conclusive evidence that prescription opioids in
19 particular play -- continue to play a very important role in
20 the drug overdose deaths in West Virginia.

21 As you'll recall, Your Honor, he looked through
22 statewide and he focused on Cabell County.

23 And, likewise, he's not the only expert who has found
24 that there was historically not much illicit opioid trade.
25 As you'll recall, Mr. Farrell referenced a Compton article

1 that was used in the cross-examination of Dr. Waller.

2 Appalachia historically did not have much illicit
3 opioid trade, but became some of the epicenters of the
4 prescription opioid crisis. These new population of persons
5 with addiction to prescription type opioids were primed for
6 even greater dependence and crisis from the coming influx of
7 heroin and illicit fentanyl in subsequent years, their
8 document used on our expert.

9 You've heard the testimony of Dr. Keyes who came and
10 also from her epidemiological studies and research concluded
11 that the increased prescription opioid supply and exposure
12 caused the increased mortality in Cabell and Huntington.

13 She took what our citizens saw and did the study and
14 came to the same conclusion. Opioid over-supply is a
15 substantial factor in overdose deaths in Cabell and
16 Huntington.

17 Again, Dr. Gupta in talking about his 2001 and 2015
18 report, the number one cause of drug overdose deaths was
19 associated with opiates, making West Virginia number one in
20 the nation.

21 THE COURT: Ms. Kearse, in your view, did the
22 over-supply actually create a demand for the illegal pills
23 or did it just satisfy the demand that was already there? I
24 don't think any of your witnesses addressed that.

25 MS. KEARSE: Specifically, I think, Your Honor --

1 I think part of our -- the over-supply of the pills that
2 were presented into the community created an addiction to
3 the prescription pills.

4 And Mr. Majestro will tell me if I get anything
5 legalese on that one. But, but from the evidence, that's
6 what we have seen just from the, from the experts, but also
7 from testimony from, from our witnesses and clients who have
8 testified before Your Honor.

9 Dr. Rahul Gupta -- Mr. Farrell touched on some of
10 these. I'm going to touch on one report. We've talked
11 about the 2001 and 2015 a bit. And just to remind Your
12 Honor, we went through this report, and this was a time when
13 Dr. Gupta became the public commissioner of the State of
14 West Virginia.

15 And the first thing he did was go back and say, "What
16 has been going on?" And actually commissioned a study, a
17 very important study. He wanted to understand better from
18 the dead so they could help with the living.

19 He testified extensively on this, this chart and his
20 findings on that both in Cabell County specifically
21 throughout and, again, the driving force of opioid addiction
22 within the city and county of Cabell County. Over 6,000
23 drug overdose deaths in West Virginia from 2015 were
24 opioid-related.

25 And you'll see, Your Honor, there's other drugs and

1 other things within these reports there, but the
2 over-arching driving force of all of these studies and the
3 results coming from those are the opioids detected in the
4 drug overdose deaths. And I'm not going to go into much
5 detail with that.

6 But I wanted to highlight one other report that we
7 didn't spend a lot of time on. It was a long couple days
8 with Dr. Gupta. But he did testify about the 2016 outbreak
9 in the City of Huntington and Cabell County.

10 On August -- in August, 2016, within five hours there
11 were 28 overdoses, one death, and there may have been two
12 subsequent to that. On this day, the, the City of
13 Huntington and Cabell County contacted the county health
14 department who then contacted Dr. Gupta and asked, "We need
15 to do something. What is going on?"

16 Dr. Gupta did the same thing as he did in the social
17 autopsy in 2016, and did a study just specific for Cabell
18 County on that day of what happened with 28 overdoses with
19 that.

20 And with that, what he found was three areas that
21 needed to be focused on. But, again, at least with this
22 time, he actually had living people because they didn't all
23 die. They could actually go through the records and
24 interview and talk to people of what they did, not all 28,
25 but a number of them.

1 And what he found was that one of the things that they
2 recommended, in addition to gathering data, was the
3 continuum of care was missing when you have someone who
4 overdosed. How do we get out of a cycle of overdose? How
5 do we deal with addiction?

6 And one of the things he actually testified to -- and
7 I'll read this to Your Honor for the record. Again, another
8 study to find out what can we do to -- for the future.

9 "And did you follow up --"

10 Question: "And did you follow up on these
11 interventions with various community folks with Cabell and
12 Huntington?"

13 "Yes."

14 "So we began to think, okay, how do we work with those
15 recommendations moving forward? So one of the things we
16 created at the point was called a QRT."

17 Your Honor heard a lot of testimony about the Quick
18 Response Teams. Quick Response Teams became necessary as
19 some of the cornerstones of what the community needs and
20 other communities in regard to overdoses on that.

21 "QRTs are generally a team of first responders, a
22 social worker, and someone from the Health Department. So
23 if someone is in the hospital, comes in, and is discharged,
24 within 24 to 72 hours a QRT will go back to the point and
25 ask them, 'Hey, what are all these things we can help you

1 with? Can we offer you treatment? Can we offer you
2 naloxone? Can we offer you any other assistance?' The idea
3 here was to prevent these people from dying and overdosing
4 and offering them a non-judgment way of treatment."

5 The three recommendations that came out were basically
6 surveillance, the healthcare system response, and community
7 response, again moving the opioid epidemic into the need for
8 the surveillance to understand the data, for the healthcare
9 response to ensure that there's a continuum of care that
10 someone in the throes of addiction can get the treatment.

11 It specifically talks about the medically assisted
12 therapy treatment that we've talked about in our abatement
13 plan and others have testified through trial and a community
14 response.

15 Opioid use disorder. Mr. Farrell touched about this.
16 I'll go quickly through this. But Dr. Keyes talked about
17 that. And I'll just, I'll just remind the Court of one of
18 the consensus statements there; that opioid use disorder is
19 caused by repeated exposures to opioids.

20 It seems obvious that you can't have opioid use
21 disorder without the exposure to opioids. But Dr. Keyes
22 took great length and time of going through her analysis to
23 confirm that through epidemiology, that that is what she has
24 seen in Cabell County and City of Huntington.

25 And the tremendous expansion, the supply of powerful,

1 high-potency, as well as long-acting prescription opioids
2 led to scaled increases in prescription opioid dependence.
3 That should be undisputed in this trial.

4 I'll talk a little bit about some of the related harms
5 quickly so that we can just go over some of the evidence
6 that we had. But then you'll remember I showed this, this
7 earlier about the fabric of the community.

8 But Dr. Yingling laid out a number of the related harms
9 of addiction, as did a number of other experts that I'll
10 highlight with that. And we kind of drilled down by
11 different subject matter so we could provide Your Honor
12 additional testimony from experts on different things.

13 But the related harms of the addiction of opioids in a
14 community has been the infections of hepatitis B and C; the
15 pregnant mothers and their offsprings affected by addiction;
16 the overflow of the patients in the emergency rooms; the
17 hospitalization of patients; long-term care for those
18 suffering from addiction; and the support systems and strain
19 on Cabell County, City of Huntington; the loss of life,
20 obviously, and the sadness if a loved one dies; the economic
21 outcome of loss of life and displaced families; neglected
22 children placed in foster care.

23 We took what Dr. Yingling talked about as a fact
24 witness and what he's observed as a lifelong resident of
25 City of Huntington and Cabell County and took these -- asked

1 the experts for them to look at their things too.

2 You'll remember Dr. Feinberg. Dr. Feinberg is a
3 infectious disease specialist at WVU. And Dr. Feinberg came
4 in to talk about specifically what she had seen in southern
5 West Virginia and specifically what she has witnessed in
6 Cabell County and what she has studied and published on
7 regarding infectious disease and harms.

8 And sometimes these are subject matters that aren't
9 easy to talk about with that. And sometimes it's hard to
10 even imagine if you haven't been with someone in the throes
11 of addiction of how we've gotten to injected use of drugs
12 and how we get to then the, the harms of infectious
13 diseases.

14 But she testified about the people who inject drugs.
15 Every time you inject, there's a 1 in 160 chance of
16 acquiring HIV. She talked about the new cases that were
17 coming to Cabell County. In 2019, 90 percent were among
18 people who inject drugs, opioid-related drugs.

19 And West Virginia has consistently been the top two or
20 three states for hepatitis C infections, while Cabell County
21 has been higher still.

22 She talked about the various hepatitis B, endocarditis.
23 And Dr. Feinberg testified there's no question in her mind,
24 in her professional opinion that the public health crisis of
25 blood-borne disease and opioid use in Cabell County are

1 related.

2 You heard from Dr. Young. Dr. Young came in and talked
3 about the children of family harms and the opioid epidemic
4 increased child welfare with 80 percent related to substance
5 abuse and the overwhelming number which involve opioids.

6 She talked about the opioid epidemic increasing the
7 percentage of children and the harms to the children with
8 that, as Your Honor will recall.

9 She testified about the pregnant women in Cabell County
10 being admitted for treatment with OUD for prescription
11 opioids, all ways of interventions that need to be
12 implemented in order to work with the opioid addicted
13 population that the city and county are facing today.

14 Again, Dr. Keyes and Dr. Alexander both looking from
15 expert epidemiological studies. Dr. Keyes: Increased
16 exposure to the supply of prescription opioids in a
17 community has a positive causal association with child
18 health harms, including Neonatal -- NAS which Your Honor
19 heard about from Dr. Werthammer and others.

20 Dr. Alexander who we'll talk about more with the
21 abatement plan: The opioid epidemic has created a need to
22 disrupt the cycle, the intergenerational cycle of addiction.
23 This gets passed down not invariably but not uncommonly from
24 a grandparent to a parent to a child and so on.

25 I believe all of our witnesses that came before Your

1 Honor from the community talked about these various issues
2 that then were studied by the experts.

3 I'll touch on this and Mr. Farrell touched on this too,
4 but this will be in the record, Your Honor, and we'll have
5 cites for you. But when we talk about the transition to
6 heroin and the intertwining of the prescription pills and
7 use of heroin, in addition to Dr. Waller's testimony about
8 the molecular structure, Dr. Keyes testified about the
9 volume of prescription pills increasing to heroin.

10 Dr. Gupta testified that we are consistently gathering
11 data that was showing the use of prescriptions. And because
12 the supply had reduced, they had transitioned to seek drugs
13 predominantly.

14 You heard from Doctor -- from Skip Holbrook that I
15 showed you earlier. I believe Mr. Farrell showed you both
16 Dr. Waller and Dr. Gilligan's testimony on this.

17 The record is replete with Dr. Keyes, Dr. Gupta -- I
18 won't go into every one of them. But Dr. Keyes remembered
19 80 percent of people who have used heroin started with
20 prescription opioids first.

21 Dr. Gupta talked about the clear pathway from
22 prescription drugs to fentanyl as a fact witness.

23 Again, Dr. Waller talked about the brain and the clear
24 connection between prescription opioid abuse and heroin
25 abuse.

1 Dr. McGuire -- you haven't heard much about him today.
2 Dr. McGuire also in his studies and research of the harms
3 associated with Cabell County as he put a dollar sign just
4 to demonstrate for Your Honor the harm that opioids has, has
5 put on the county and city, the high potential for abuse
6 which can lead users to substitute more lethal opioids
7 without accepted medical uses such as heroin or fentanyl.

8 Dr. Alexander we touched about and, again, Dr. Gilligan
9 and Dr. Murphy. I don't know if we mentioned Dr. Murphy
10 yet, defendants' health economist expert, also testified if
11 you focus on abuse of prescription opioids and abuse of
12 heroin, they're probably closer to substitutes like Coke or
13 Pepsi.

14 Mr. Farrell touched on the abatement plan. I'm just
15 going to touch on a couple things with this. And -- but,
16 Your Honor, what we presented to you was well documented
17 within the medical literature best practices of bringing
18 together what is needed for the community.

19 Dr. Alexander specializes as an epidemiologist and
20 works in the abatement. Each one of these have been
21 actually utilized within the community, not all of them,
22 some of them. And we went through that in the, the
23 testimony and we'll have more in the findings of fact.

24 Sustainability is an issue. Whether there is capacity
25 is an issue, and also just ensuring that we have the ability

1 for the funding to put these together.

2 There was some reference to the one epidemic and, and
3 do you treat a prescription epidemic or a heroin epidemic
4 any differently. It's one epidemic and that's why we've
5 seen throughout this trial, throughout the witnesses there
6 the intertwining of the two of opioids on that too.

7 But each have testified, again Dr. Keyes and Dr.
8 Alexander and Chief Holbrook, that the epidemic is an opioid
9 epidemic, not one particular type of opioid or another.
10 It's an opioid epidemic. It's had a direct result and a
11 predominant prescription drug threat in Appalachia.

12 Again, Dr. Alexander testified prescription opioids and
13 heroin and fentanyl are two sides of the same coin.

14 I think it's important for our, our abatement plan that
15 we're asking Your Honor the funding for it to demonstrate
16 that there's still an on-going crisis. And the witnesses
17 both that Mr. Farrell mentioned and that came into this
18 courtroom and as documented in the documents, it's not going
19 away tomorrow. It's going to take some time and we're still
20 in it. It's a generational problem, so we will be dealing
21 with it for quite some time.

22 Mayor Williams testified, "We fight it every day."

23 Dr. Alexander testified about the multi-faceted plan
24 and treatment of opioid addiction is an important part of
25 it. Mr. Farrell touched about this as well. And we've seen

1 it through just the, the experts in the case that if you're
2 going to deal with the opioid addiction, you're going to
3 have to deal with the, the treatment and the other areas of
4 abatement that we're asking for on that.

5 You'll recall Dr. Waller, first witness, and he was
6 actually asked about MAT. He actually has testified before
7 U.S. Congress on MAT and has actually written the, the
8 diagnostic book on medically assisted treatment.

9 He had a long conversation about it. But he also
10 brought it back to the fact that the MAT is a -- evidence is
11 so strong. It's been greater than half a century. Hundreds
12 of thousands of publications have backed it up.

13 And it is a treatment for a community. It's a
14 treatment for individuals. It's a treatment that ensures
15 that the social networks and stabilize the communities.

16 We thought that was important to remind Your Honor
17 that, that early testimony in the first day as we get to the
18 last day that we're asking for an abatement plan on that
19 too.

20 But, again, Dr. Alexander testified about the reviewing
21 materials he's reviewed and speaking from the individuals,
22 there's still an existential threat to the county and city
23 and we need to scale up our programs. We need new programs
24 and we need the funding to support it.

25 The cost of doing nothing is nothing. If we don't

1 address it, we just get into more enormous social and
2 psychological and economic cost of inaction.

3 You heard, Your Honor -- just to, to remind you about
4 some of the sustainability. We had witnesses on the stand
5 who talked about the various grants they get. And, and I
6 think every one of our local witnesses talked about the, the
7 time that they take in getting grants to actually work
8 through a lot of these programs with that. Most everything
9 is written out as grant money. If you knew -- it is
10 reliable funding that we need. Sustainability is what it's
11 looking for. We can't do it all as piecemeal. The experts
12 agreed grant money is not guaranteed. Funding is unstable.

13 Mr. Farrell went over the abatement cost plan on that
14 too. All necessary elements of the plan that Dr. Alexander
15 went through, his working with the community and working on
16 his -- looking at what are the best practices and what are
17 the known practices to alleviate an opioid crisis such as in
18 Huntington and Cabell County.

19 I think it's important that we get this program -- as
20 Jan Rader testified, addiction and substance use disorder is
21 something that people live through, live throughout their
22 lives. We've taken the plan out to 15 years to accompany
23 that. It's not an overnight thing that we can work through.
24 We need to take the time and it takes the funding to get to
25 that plan.

1 We saw it during the pandemic. You heard from various
2 experts of the rising number of overdoses that happened and
3 the fragility of addiction. And part of that is the ability
4 to have treatment available, have the resources available,
5 have the tools available for people who are addicted.

6 I showed this in, in opening, Your Honor, and I think
7 it's, it's a good way to, to wrap up my comments in addition
8 to what Mr. Farrell covered is that the addiction in Cabell
9 County and City of Huntington has been a community-wide
10 health problem.

11 Addiction of opioids and the other harms associated
12 with that has spread out the ripple effect in the community.

13 And I think it's important with this and we've talked
14 about -- Dr. Gilligan actually was presented with the fact
15 that for every one overdose, for every one death, there are
16 10 treatments of admissions for abuse. This is from the CDC
17 that he testified about. 32 admissions emergency
18 department. 130 people die who abused -- people who abuse
19 are, are dependent and addicted. And 825 non-medical users.

20 So it just goes to show that the fact that it's not an
21 individual issue. It's a community-wide issue. And I think
22 Your Honor has asked questions about this, why is this not
23 individual issues versus a community issue.

24 I think the evidence has been clear from our experts,
25 from our witnesses that the opioid epidemic has been a

1 community issue. They have treated it as a community issue.
2 They've worked together as a community to deal with the
3 issues and look for Your Honor to empower them to do more
4 with that.

5 Your Honor, we submit our case to you to empower the
6 City of Huntington and Cabell County to work with the opioid
7 crisis that they have, to work together as they have in the
8 past, and award sustainable funding so that they can deal
9 with their opioid addiction.

10 We also submit to Your Honor that the county and city
11 have an infrastructure within the community to be able to do
12 what they need to do with sustainable funding, funding that
13 we believe that we have proven to your court that we have
14 the need, we have the means, at least to implement it, and
15 we've proven the liability for the responsibility of these
16 companies to fund a program for City of Huntington and
17 Cabell County.

18 Your Honor, thank you for your time.

19 THE COURT: Thank you, Ms. Kearse.

20 Well, we're way ahead of schedule. It's 20 till 12:00.

21 Can we come back at 1:00? Is that too soon, Mr.
22 Nicholas?

23 MR. NICHOLAS: Whatever is best for the Court.
24 That's perfectly fine.

25 THE COURT: That will give you enough time to warm

1 up?

2 MR. NICHOLAS: I think so.

3 THE COURT: Okay. Let's come back at 1:00. We'll
4 be in recess until 1:00.

5 (Recess taken at 11:41 a.m.)

6 THE COURT: Yes, ma'am?

7 MS. WICHT: Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 MS. WICHT: Before Mr. Nicholas goes, I wanted to
10 -- when we were last together two weeks ago, we had let you
11 know that there were a few deposition designations by the
12 defense that were still working their way through the
13 process. We've completed that now. And so, I just wanted
14 to formally, for the purposes of the record, let the Court
15 know that we've now submitted the deposition designations
16 for Darren Cox, Robert Niddle (phonetic), Michael Mapes, the
17 Cabell County Commission via its 30(b)(6) testimony of Beth
18 Thompson, and some additional designations by Mr. Gilberto
19 Conterro.

20 THE COURT: Thank you, Ms. Wicht.

21 MS. WICHT: Thank you.

22 THE COURT: All right, sir.

23 MR. NICHOLAS: Good afternoon, Your Honor.

24 THE COURT: Good afternoon, Mr. Nicholas.

25 MR. NICHOLAS: On behalf of AmerisourceBergen,

1 thank you for your consideration during this entire trial.
2 We are now ready to sum up and we look forward to doing so.
3 And I would start this way.

4 We have nothing but respect for the people of
5 Huntington and Cabell who we met during this trial who are
6 involved in attacking this crisis and turning it around. It
7 was impressive.

8 But basically every witness in this case has confirmed
9 what really happened here. Licensed physicians chose to
10 address the issue of pain in Huntington and Cabell County by
11 prescribing more opioid medication. 99-plus percent of them
12 did so in good faith, using their own medical judgment,
13 applying the medical standards of the day.

14 Licensed pharmacies dispensed the medicines that these
15 doctors prescribed. The only thing to be said about the
16 distributors is that they did not second-guess these medical
17 judgments. They did not subvert the standard of care. They
18 did not countermand medical decisions and withhold medicine.

19 They weren't qualified to do that. It wasn't their
20 place to do that. The healthcare supply chain would have
21 been fractured had they done it. And medicine would not
22 have gone where it needed to go.

23 With all that said, AmerisourceBergen did its job. We
24 had a Suspicious Order Monitoring Program, a really good
25 one, which was described by our witnesses and unchallenged

1 during the trial.

2 Who in this trial actually suggested to the Court what
3 AmerisourceBergen should have done but did not do? No one.

4 And let's be clear. AmerisourceBergen reported
5 suspicious orders. We reported them around the country. We
6 reported them in West Virginia. We reported them in Cabell
7 County. We reported them in the City of Huntington. We
8 also reported every single opioid shipment to the DEA
9 contemporaneously.

10 Where was the evidence of unreasonable conduct by
11 AmerisourceBergen? There was none. And it's not like the
12 plaintiffs didn't have a full opportunity to put on a case.
13 They used six and a half weeks. They offered historians,
14 data analysts, experts, government officials. But as we
15 listened to all these witnesses, what stood out is that they
16 didn't have anything specific to say about
17 AmerisourceBergen. All that they actually established was a
18 number of pills, volume.

19 The hole in the plaintiffs' case, direct causation,
20 simply was not addressed. The plaintiffs ignored it. They
21 continued to ignore it through their closings. They relied
22 on volume, but they provided no context.

23 You know, the plaintiffs are fond of expressions like
24 pill spill, but the distributors did not -- it's not as if
25 the distributors backed a fleet of trucks up, you know, into

1 Huntington and dumped pills into the street. They shipped
2 medicine to licensed pharmacies pursuant to lawful
3 prescriptions of an FDA approved medication written by
4 licensed doctors and the distribution numbers and the
5 prescription numbers lined up almost exactly 1:1 because
6 prescribing drove, drove distribution.

7 All of this has been a source of enormous frustration
8 and I'm speaking now especially for AmerisourceBergen, Your
9 Honor, whose people are so dedicated, whose determination to
10 do a good job has been so pronounced, and whose record
11 frankly reflects it, reflects that. We've never even been
12 fined by the DEA.

13 There is, however, a kind of catharsis in having been
14 able to tell our story and expose the plaintiffs' case as
15 misguided, misplaced, and having failed for a lack of proof.

16 And with that, by way of introduction, now I will more
17 formally begin and I'd like to start with the standard.

18 Plaintiffs had to prove that AmerisourceBergen engaged
19 in unreasonable conduct that was a direct proximate cause of
20 the harm they have sought to establish in this case. They
21 did not establish any unreasonable conduct by
22 AmerisourceBergen and they did not prove causation.

23 The plaintiffs have shown no bad conduct on the part of
24 AmerisourceBergen in Cabell County and the City of
25 Huntington. Their fallback has been to suggest that there's

1 some kind of systemwide failure on AmerisourceBergen's part.
2 There was no evidence of that either. So, I'm first going
3 to address the issue of conduct as it relates to Cabell and
4 Huntington and then as it relates to AmerisourceBergen's
5 overall systems.

6 But before I do that, I would like to re-introduce to
7 the Court the four AmerisourceBergen witnesses who
8 testified. Chris Zimmerman, Steve Mays, David May and
9 Michael Perry all testified as of cross in plaintiffs' case.
10 And if the plaintiffs hadn't called them, I most certainly
11 would have. They brought something that no one else did,
12 firsthand knowledge from 1998 to the present.

13 Mr. Farrell, I think the first thing he showed you, the
14 very first slide he showed you, was from his historian who
15 made the reference as to how important primary sources are.
16 These are the primary sources, these four witnesses.

17 They were able to testify about meetings they attended,
18 presentations they made, training that they personally did,
19 and interactions that they personally had with the DEA.
20 These were the most informative witnesses in the case.
21 Let's take them from left to right.

22 Chris Zimmerman, who has been with AmerisourceBergen
23 since the mid-1990s, is an industry pioneer and the
24 architect of the 1998 program that the company developed
25 with the DEA and that the DEA approved in writing. He was

1 on stage with the DEA in 2007 and again in 2009 when
2 AmerisourceBergen's program was held out as the industry
3 standard.

4 Steve Mays. Steve Mays is a longtime Diversion Control
5 employee with firsthand knowledge of the key events starting
6 in the early 2000s. He trained DEA diversion investigators.
7 There was testimony in this case about the 2005 DEA
8 distributor initiatives when the DEA met with the different
9 distributors.

10 Mr. Mays is the only person who testified at trial who
11 actually attended these meetings. Not Mr. Rannazzisi. Not
12 anyone else. Only Mr. Mays was there. And he told the
13 Court what happened and it was not what the plaintiffs said
14 happened.

15 David May joined AmerisourceBergen after a
16 distinguished 30-year career with the DEA to head up
17 Diversion Control beginning in 2014. He had an ironclad
18 grasp of AmerisourceBergen's program, how it worked, and why
19 it was effective. He explained how the company leveraged
20 technology as the program evolved.

21 Mike Perry. Michael Perry was AmerisourceBergen's
22 sales representative in Huntington and Cabell County. He
23 was a resident of Huntington, a graduate of Marshall, and is
24 devoted, obviously devoted, to his community. You may
25 recall that he testified with great enthusiasm.

1 What was most important about his testimony was his
2 knowledge and understanding of AmerisourceBergen's customer
3 base in Cabell and Huntington. He regularly visited these
4 customers. He was able to describe their locations, their
5 physical appearance, the people who worked there, the kind
6 of business they ran. He testified about the absence of red
7 flags. None of Mr. Perry's testimony was refuted.

8 And this leads to the first point. The plaintiffs did
9 not establish any unreasonable conduct on the part of
10 AmerisourceBergen in Huntington or Cabell.

11 Excuse me.

12 Three important points right off the bat which, by now,
13 are well known to this court. First, AmerisourceBergen only
14 distributed to licensed pharmacies in Cabell and Huntington.
15 This was confirmed by witnesses from both sides.

16 Second, AmerisourceBergen reported to the DEA every
17 shipment of prescription opioids that it sent to Cabell and
18 Huntington. Every one.

19 Third, AmerisourceBergen reported suspicious orders for
20 its customers in Cabell County and Huntington.

21 Now, let's take a closer look at AmerisourceBergen's
22 distribution to the plaintiffs in Cabell and Huntington. We
23 were a full -- a full line wholesale distributor into Cabell
24 and Huntington; meaning AmerisourceBergen distributed the
25 full range of prescription medications and other health

1 products, not just opioids.

2 And understanding that, it is important to look at the
3 overall shipments during the key years to compare the
4 shipments of opioids to the shipments of health medicines
5 overall into the community.

6 On this, on this, we were helped by the testimony of
7 Ted Martins, a Price Waterhouse partner. He testified late
8 in the trial. His testimony was brief, but it was extremely
9 interesting. And here is what we learned:

10 This data depicts what we learned and I would draw
11 several takeaways from this data. First of all, the overall
12 shipments of all prescription medications to this county was
13 extremely high, very high.

14 Dr. Gupta testified to this, as well. He told us that
15 West Virginia ranked number one in the country for all
16 prescriptions per capita. Number one in the country.

17 The next point from -- that we can draw from this chart
18 is this. Opioids represented a very small percent of the
19 medications. The opioids are the yellow line. The overall
20 distribution is the blue line.

21 And the final point is that the shipment of opioids was
22 not out of line at all. It didn't even keep pace with the
23 shipment of other medicines in, for example, the peak year,
24 which was 2009.

25 If the opioid shipments were disproportionate, the

1 bottom line, the yellow, would be getting closer to the top
2 line, but it never did. In fact, the top line moved further
3 away from the bottom line during the crucial years.

4 So, the idea that there was something untoward about the
5 amount of opioids that were shipped into the county is
6 completely undermined right here. Right here.

7 Now, let's look at AmerisourceBergen's customers and
8 what we heard about them at trial. In our opening, I
9 displayed this list of AmerisourceBergen customers in Cabell
10 and Huntington. Here is the list. Let's go through it and
11 let's start off with the customers that were not mentioned
12 by the plaintiffs at all. They're highlighted in yellow.

13 The plaintiffs had nothing to say, not a word about
14 these AmerisourceBergen customers, and they appear to have
15 no issue with them whatsoever. These customers comprised a
16 significant portion of our distribution into Huntington and
17 Cabell and include two of the State's leading hospitals, St.
18 Mary's and Cabell-Huntington. These yellowed customers have
19 gone unmentioned by the plaintiffs, so let's remove them
20 from the list.

21 Now, let's next go to customers that were mentioned
22 only briefly and only by data experts. For this next group
23 of customers, the only evidence that the plaintiffs
24 introduced was the number of pills they received. That was
25 literally it. And that was the second week of trial and

1 they never circled back.

2 The plaintiffs never proved oversupply to these
3 customers. The lawyers inferred it, but no one in the trial
4 testified that our distribution to these customers was too
5 high.

6 And, to the contrary, here is what Dr. McCann said on
7 this very point. Question, and you cannot tell this Court
8 how many prescription opioids should have been distributed
9 to Cabell County or the City of Huntington; correct?
10 Answer, correct. You cannot say whether or not all the
11 charts you showed over the last day and a half show
12 oversupply or undersupply; correct? Answer, correct. And
13 no one else could either. No one else could either.

14 Back to the list. The plaintiffs have no evidence of
15 unreasonable conduct as to these pharmacies. They avoid any
16 discussion of them at all. Let's strike them off the list.

17 The plaintiffs only paid any attention at all during
18 this trial to four of AmerisourceBergen's 31 customers and
19 very little even as to those. Let's focus on three of them,
20 two Walgreen's stores and Drug Emporium.

21 The only testimony about these stores was through their
22 expert, Lacey Keller. The only testimony. And as this
23 Court will recall, Ms. Keller focused on three prescribers,
24 Deleno Webb, Phillip Fisher and Gregory Chaney, when -- who
25 she tried to connect to AmerisourceBergen. The evidence was

1 thin to nonexistent. This is the sum total of it.

2 Now, this chart provides me with a jumping off point to
3 address the top prescriber, bad doctor, whatever you want to
4 call it point, once and for all. What is it that the
5 plaintiffs are actually saying here? Because it's not
6 entirely clear.

7 What they seem to be doing is picking these doctors
8 that they know later got in trouble and saying that because
9 they were top prescribers at pharmacies we service, we
10 should have known something was wrong. So, they're saying
11 we should have seen into the future. That's number one.

12 But, also, they're taking the expression top prescriber
13 and making it automatically pejorative, but that's -- that's
14 ridiculous. Look at this evidence. Look at the top
15 prescribers at these pharmacies. These -- these are the
16 pharmacies that the plaintiffs picked. But when we forced
17 their expert to show the real numbers, the whole idea of
18 this fell apart on them.

19 These doctors prescribed less than one percent of the
20 medications at these pharmacies combined. All three of
21 these doctors combined prescribed less than one percent.
22 Yet, the plaintiffs are acting as if this should have set
23 off alarm bells. On what basis?

24 Clearly, there was no evidence of unreasonable conduct
25 here. Let's strike the Walgreen's and Drug Emporium stores

1 from the list.

2 THE COURT: By medications, are you referring to
3 opioids or all medications? You said they prescribed less
4 than one percent.

5 MR. NICHOLAS: Of all -- of all prescription -- of
6 all prescribed -- of all prescriptions.

7 THE COURT: Okay.

8 MR. NICHOLAS: The only pharmacy left standing is
9 SafeScript and I think it is correct to say, I think it's
10 correct to say, that we've heard more from the lawyers in
11 their opening and closing about SafeScript than we heard
12 testimony or evidence during the entire trial.
13 Nevertheless, I am happy to talk about SafeScript.
14 SafeScript was only one of our 31 customers. It had its own
15 DEA registration and its own state license.

16 Here's the evidence that the plaintiffs offered. They
17 offered volume of pills, the fact that AmerisourceBergen
18 granted a threshold request in October of 2011 when
19 SafeScript's purchases were at 86 percent controlled
20 substances, and they offered the fact that the owner was
21 arrested at a traffic stop and the pharmacy closed. That
22 was their evidence.

23 Here is the evidence that the plaintiffs did not offer.
24 They offered no evidence that a single prescription pill
25 that AmerisourceBergen distributed was diverted.

1 They offered no evidence that the owner or the
2 pharmacist was ever prosecuted.

3 They offered no evidence that SafeScript ever failed a
4 Board of Pharmacy inspection. And we heard testimony about
5 how often the Board of Pharmacy did its inspections.

6 We heard no evidence that the Board of Pharmacy took
7 any action.

8 We heard no evidence of any actual harm tied to
9 SafeScript.

10 We heard no testimony from any plaintiffs' witness who
11 knew anything about SafeScript. Nothing.

12 We heard no evidence of any investigations or action
13 taken by the Huntington Police Department.

14 And on this point about the Huntington Police
15 Department, this Court admitted into evidence at least four
16 years' worth of Huntington Police Department's annual
17 reports, as well as numerous drug threat assessments. Those
18 reports and assessments set forth the department's
19 accomplishments in detail, including drug arrests and
20 investigations.

21 There is not a single reference to SafeScript in any of
22 these documents. And if SafeScript was an issue, if it was
23 an issue, it would have been in there.

24 And how do we know it? We know it because when there
25 was a problem with a pharmacy in the community the

1 Huntington Police Department wrote about it. Their 2014
2 Annual Report provides a ready example, A Plus Pharmacy,
3 which was not serviced by any distributor in this case.

4 This pharmacy really was a problem in the community,
5 but incredibly unsurprisingly, plaintiffs didn't talk about
6 it at all. Didn't mention it.

7 Now, here is what AmerisourceBergen offered as to
8 SafeScript. Every transaction down to the pill level was
9 reported to the DEA. AmerisourceBergen reported suspicious
10 orders for SafeScript to the DEA. And here they are.

11 AmerisourceBergen conducted due diligence reviews of
12 SafeScript. Here are notes in our files in evidence in this
13 case describing a portion of our due diligence to
14 SafeScript.

15 SafeScript's volume of -- SafeScript's volume of
16 opioids went down every year from 2007 forward. That runs
17 directly counter to everything that the plaintiffs are
18 implying about SafeScript, but there it is. I believe the
19 blue is oxycodone. The red is hydrocodone.

20 Now, Your Honor may recall that the plaintiffs tried to
21 make something of an issue out of a threshold increase in
22 2011. This threshold, the threshold, in fact, moved up and
23 down over the years in response to the pharmacies' needs.

24 Now, the plaintiffs would have you believe that this
25 one threshold increase led to an influx of pills. But what

1 actually happened? SafeScript's volume of opioids went down
2 after the threshold increase.

3 Question, all I want to ask you is -- this is to Dr.
4 McCann, their expert -- is, this is August of 2011. Just
5 from your analysis of the ARCOS data, after August, 2011,
6 SafeScript's purchasing for oxycodone actually went down,
7 correct? Answer, this e-mail seems to have been effective.
8 Question, effective in lowering SafeScript's purchasing,
9 correct? Answer, correct. And the e-mail reference was an
10 e-mail from AmerisourceBergen.

11 Continuing on. As soon as we learned there was a
12 problem with the owner, we terminated the relationship.
13 Most importantly was Mike Perry's firsthand account. And
14 what did he say? He said he visited at least every other
15 week. He visited SafeScript, as he visited his other
16 customers.

17 He said SafeScript was licensed by the Board of
18 Pharmacy and the DEA. He saw no lines. He saw no people
19 loitering outside. He saw no empty pill bottles or needles.
20 He saw no out-of-state license plates aside from the
21 Tri-State area license plates. He had no concerns about his
22 contact, who was the Pharmacist in Charge, and he was aware
23 of a customer base that fit the profile of the pills that
24 were being shipped.

25 So, let's go back to our customer list to close the

1 loop on SafeScript. It's one of 31 customers. There is no
2 evidence of any diversion and there is no evidence of what
3 the plaintiffs are implying.

4 How is this the cornerstone of their -- a cornerstone
5 of their entire case? SafeScript should come off the list.
6 And this should be the end of the case. They did not prove
7 any unreasonable conduct in this jurisdiction, let alone
8 unreasonable conduct that caused any harm.

9 With zero evidence of unreasonable behavior by
10 AmerisourceBergen and Cabell or Huntington, the plaintiffs
11 have tried to put forth a secondary position, that our
12 system had, quote, "systemic", unquote, failures that
13 affected Cabell and Huntington in some way.

14 The huge problem with this, even leaving aside
15 causation for a minute, is that there was no proof of
16 systemic failures. Let's begin at the beginning and look at
17 the legal requirements under the CSA.

18 The CSA asks four things of distributors. The first is
19 physical security. As long as controlled substances are in
20 the possession of a distributor, they must be kept under
21 lock and key and stored safely pursuant to very specific
22 physical requirements.

23 This is a big undertaking. Mr. Zimmerman recited the
24 specifications for you in his testimony. They were
25 extremely detailed.

1 And this Court heard no evidence from the plaintiffs
2 that we failed to meet the physical security requirements
3 whatsoever. There is no evidence that opioids were diverted
4 while under our control. That is undisputed. We can check
5 that one off in green.

6 The second CSA requirement is license verification.
7 The plaintiffs have talked about customer due diligence and
8 Know Your Customer requirements. We do those things, and I
9 will get to them in more detail in a minute, but let's look
10 at what the regulation requires.

11 The registrant shall make a good faith inquiry either
12 -- inquiry either with the administration or with the
13 appropriate state controlled substances registration agency,
14 if any, to determine that the person is registered to
15 possess the controlled substance.

16 This isn't a disputed issue in the case either. The
17 plaintiffs' experts have acknowledged as much. We can move
18 on. We can move on.

19 But before I do, and so we can -- we can go back to
20 that one and we'll move on, but I do want to touch on the
21 issue of customer due diligence a little bit further right
22 now.

23 The plaintiffs have tried to suggest that we didn't do
24 sufficient due diligence on our customers. They've provided
25 no support for that other than to say it, but we have

1 discussed our due diligence in detail. For example, it is
2 in the record that we did investigations into nine of our
3 customers in Cabell-Huntington and in many, many other
4 pharmacies nationwide. It's in the record that we have,
5 over the years, developed all manners of data analytics that
6 we use every time that an order is flagged for review that
7 requires human personal review. That's due diligence.

8 It is in the record that Mr. Perry, as an example,
9 walked into these pharmacies not once, but every couple of
10 weeks. He knew what he was looking for and he kept his eye
11 out for red flags. All of this is in the record. All of
12 this is due diligence.

13 The plaintiffs have showed you nothing to counter this.
14 They just keep saying that we didn't do due diligence. But
15 that's not true.

16 We introduced evidence of due diligence at a number of
17 pharmacies. Here are two examples. The -- and I'll read
18 them. These are -- so, this is -- this is internal
19 communication reciting some of the due diligence that we did
20 and these are contemporaneous documents.

21 The account manager, Michael Perry, forwarded the CSRA
22 Form 590 and photographs. Investigation does not indicate
23 any type of diversion.

24 And the dashboard on the right is the evidence that we
25 continued to -- we continued to review and analyze this

1 pharmacy routinely through 2015, which is when we stopped
2 doing the business with them.

3 The same is true -- and I just read to you from -- this
4 was the McCloud Family Pharmacy.

5 The same is true for Drug Emporium. Same idea. CSRA
6 initiated an investigation of Drug Emporium number 1.
7 Account manager Michael Perry completed CSRA Form 590.
8 There is no indication of diversion. And, again, here the
9 dashboard from 2015 proving up the continued due diligence.

10 And just to -- and just -- just to pause here, we
11 introduced records of this nature during the course of this
12 trial. I heard Mr. Farrell say we didn't keep records, but
13 we did keep records.

14 You heard about our due diligence from our witnesses,
15 each of whom described what we do with specificity and
16 detail of record and under oath.

17 So, back to the requirements under the CSRA. We've
18 already shaded in license verification. Good.

19 The third thing that's expected of distributors, the
20 third requirement, is ARCOS reporting. The Court has heard
21 a lot of -- this Court has heard a lot about ARCOS reporting
22 and the fact that the distributors are required to report to
23 the DEA all shipments of prescription opioids to its
24 customers down to the individual transaction level.

25 We did that as confirmed by plaintiffs' expert, Craig

1 McCann. Virtually perfect. 99.9 percent. So, there's no
2 dispute about our -- meeting our ARCOS requirements either.

3 And the fourth requirement is to maintain a Suspicious
4 Order Monitoring Program. This is the only subsection that
5 the plaintiffs have pointed to. Let me read here. The
6 plaintiff, the registrant, shall design and operate a system
7 to disclose to the registrant suspicious orders of
8 controlled substances.

9 The registrant shall inform the field division office
10 of the administration in his area of suspicious orders when
11 discovered by the registrants. Suspicious orders include
12 orders of unusual size, orders of -- orders deviating
13 substantially from a normal pattern, and orders of unusual
14 frequency.

15 This is the only subsection that the plaintiffs have
16 pointed to. It has not changed since 1971 when it was
17 enacted.

18 And I just want to pause on the language for a moment.
19 The first sentence says that the registrant shall design and
20 operate a system to disclose to the registrant suspicious
21 orders of controlled substances. We did that. That's not
22 in dispute.

23 The second sentence, the registrant shall inform the
24 Field Division Office of the administration in his area of
25 suspicious orders when discovered by the registrant. We did

1 that and that isn't disputed either. We reported suspicious
2 orders, including in Cabell and Huntington.

3 The third sentence reads suspicious orders include
4 orders of unusual size, orders deviating substantially from
5 a normal pattern, and orders of unusual frequency. Those
6 terms have never been defined and they are subject to
7 different interpretations and factors, but one thing is
8 clear. One thing is clear.

9 Once Mr. Rannazzisi took over in 2007, the attitude of
10 the DEA became this is for you to figure out. We aren't
11 going to work with you and we will provide you no guidance.
12 This is on you.

13 Now, this is 2021. At least since 2007, no one has
14 told AmerisourceBergen your design was wrong, or your
15 threshold should have been tweaked, or you should apply a
16 different definition of unusual frequency. Even the
17 witnesses in this lawsuit haven't been able to say that.

18 With all the time and money poured into their experts
19 and all the scrutiny of our programs more than a decade
20 after the fact, if there was something actually wrong with
21 our system, they would have told you what it was. They
22 didn't do that.

23 Our story from 1996 to today is a very strong one and
24 what it shows you, above all else, is that we're not the
25 company that they want to make you believe we are. We cared

1 about these issues. We tried to be pro-active at every
2 turn.

3 You met our witnesses, Your Honor. They're clearly
4 invested in dealing with these issues the right way. We all
5 heard their testimony over the course of many days. They
6 were obviously presenting to you, to the best of their
7 ability, the events that happened and the whole history
8 here. And all of the documents you've seen have
9 corroborated what they said.

10 Is there any doubt? Is there really any doubt that
11 they were telling the truth?

12 So, now, let's look at what we've learned. And the
13 easiest way to do this is to work with a timeline. I've
14 resisted a timeline until now, but it's time for -- it's
15 time for a timeline.

16 In 1996, AmerisourceBergen approached the DEA about the
17 development of a new Suspicious Order Monitoring System. We
18 approached them. Technology was changing and we wanted to
19 stay ahead of the curve.

20 So, for two years, Chris Zimmerman and the DEA worked
21 together to develop and test the new Suspicious Order
22 Monitoring Program. The objective was clear, to make the
23 program, the suspicious order information being sent to the
24 DEA, timely, useful and customizable at the field office
25 level. The resulting program would flag orders being

1 processed at night that exceeded an agreed upon threshold
2 and automatically faxed a list of them to the local DEA
3 Field Offices in the morning. To be clear here, the DEA
4 knew that suspicious orders were reported and were then
5 shipped.

6 Now, here is the letter approving our program. We've
7 seen this several times. I will, one more time, read from
8 it. This is to grant approval of your request to implement
9 on a nationwide basis your newly developed system to
10 identify and report suspicious orders for controlled
11 substances and regulated chemicals, as required by federal
12 regulation.

13 DEA managers who have been involved with the testing of
14 the system have relayed their positive opinions regarding
15 its ability to provide information in a fashion which is not
16 only useful overall, but is also responsive to the needs of
17 the individual DEA Offices.

18 And the subject line says approve Suspicious Order
19 Monitoring Program.

20 Now, this could not be clearer and the fact that the
21 plaintiffs are continuing to deny that this was an approved
22 program is emblematic of their entire case. They are trying
23 to rewrite history. And they are doing that because they
24 know that this is a really, really bad fact for them, really
25 bad, because at least from 1998 to 2007, we were operating

1 this program with the DEA's express approval and
2 endorsement.

3 This program remained in effect until 2007 and a couple
4 of things happened during that nine-year period between 1998
5 and 2007 that are worth pointing out.

6 From 2001 through 2005, AmerisourceBergen trained the
7 individuals from the DEA who were responsible for
8 investigating diversion and enforcing the Controlled
9 Substances Act. Steve Mays conducted this training and he
10 showed this Court a copy of the presentation, which included
11 training on the regulations.

12 So, contrary to the plaintiffs' assertion or suggestion
13 that we were somehow in violation of the CSA, the DEA turned
14 to us to train its people about the CEA (verbatim) and its
15 requirements. Like so many other aspects of this case, Your
16 Honor, they're saying something, but they're not proving it,
17 and the evidence contradicts it. It disproves it.

18 The other thing that happened during this time period
19 was the 2005 distributor initiative. Multiple witnesses had
20 talked about these meetings between the individual
21 distributor defendants and the DEA, but Steve Mays was the
22 only witness who testified at trial who actually attended
23 these meetings and can talk about them firsthand. Here is
24 what Mr. Mays said.

25 Question, and, broadly speaking, what did you

1 understand DEA's concerns to be that they raised to you
2 during this meeting? Answer, it was exclusively about
3 internet pharmacy and the problems they were having with
4 internet pharmacies.

5 Question, now, do any of these three slides say that
6 the distributors should not ship an order that they deem to
7 be suspicious? Answer, no, they do not.

8 Question, now, separate from the slides, Mr. Mays, did
9 anyone at the meeting tell you from the DEA that
10 AmerisourceBergen and distributors should not ship a
11 suspicious order? Answer, no.

12 So, the meeting related to internet pharmacies, and
13 there was no mention at this meeting of changing the
14 practice to stop suspicious orders before they were shipped.
15 This testimony and the memo next to it, which is the memo
16 summarizing the meeting that was prepared by the DEA, are
17 consistent. There is no reference in this letter to not
18 shipping suspicious orders.

19 Steve Mays also testified about the steps
20 AmerisourceBergen took after the meeting. Mr. Mays, can you
21 briefly describe this new investigative program that you
22 initiated -- in response to DEA's internet pharmacy
23 initiative? Yes. It was, again, based on the discussion
24 that I had with the DEA in the August meeting. We put
25 together a policy and a procedure on how these

1 investigations were being conducted, identified the sources
2 that would prompt one of these investigations, mainly the
3 review of the possible excessive Suspicious Order Report.

4 Also, if we got a notification from DEA that they were
5 concerned about a customer, or if they took action against a
6 customer, that would prompt one of these investigations.

7 And, also, if we were notified by a distribution of
8 concerns or someone from the sales team, any of those three
9 areas would prompt one of these investigations. This is
10 pretty detailed testimony. And I even put in, you know,
11 specific procedures that had to be followed on each one to
12 make sure that we were consistent in how we conducted them.

13 This brings us to 2007, when the DEA issued an
14 Immediate Suspension Order for AmerisourceBergen's Orlando,
15 Florida facility. As Your Honor has heard, this came as a
16 complete surprise. And that's what Mr. Zimmerman told you
17 when he testified.

18 We went to the 2005 meeting, he said. We implemented a
19 new policy. We opened up additional investigations. We had
20 open dialogue with the Orlando DEA Office.

21 In 2006, they submitted us a list of questionable
22 pharmacies. We investigated them. We shut some down. We
23 denied others from opening. This is in 2006.

24 And then, you know, to get the immediate suspension
25 orders as we're working with the local DEA Offices was a

1 shock without any notice of any issues going on in Florida.

2 Mr. Zimmerman went on to explain that the suspension
3 order was related to four internet customers, three of which
4 we had already cut off as customers.

5 Now, there are a few key points about the suspension
6 order that were made very clear during the course of the
7 trial.

8 First, the Orlando distribution center did not service
9 West Virginia or Cabell.

10 Second, the suspension was limited in both scope and
11 duration.

12 Third, there was no admission of liability.

13 Fourth, there was no fine.

14 And, fifth, we began daily reporting of controlled
15 substance sales, which we continue to do to this day.

16 And AmerisourceBergen and DEA worked together to design
17 a new program that would become the new industry standard.

18 I want to pause here, first all, to take a sip of
19 water.

20 THE COURT: You tell me when you need a break, Mr.
21 Nicholas.

22 MR. NICHOLAS: I'm okay. You tell me if you need
23 a break.

24 THE COURT: Don't worry. I will.

25 MR. NICHOLAS: I would like to pause here to

1 address an issue that came to be known in the litigation as
2 do not ship. I have alluded to this already, but let's put
3 it to rest.

4 You will recall that AmerisourceBergen stopped shipping
5 suspicious orders in 2007. The other distributors stopped
6 in that same general time frame. In this litigation, in the
7 litigation generally and in this case specifically, the
8 plaintiffs have argued vehemently at times, at least for
9 awhile, that the distributors had never been allowed to ship
10 orders that had been reported as suspicious, that the
11 regulations and the DEA forbade it. In the face of the
12 following evidence, Your Honor, this position became totally
13 untenable and insupportable.

14 First of all, the shipping requirement does not appear
15 in the regulation.

16 Second, Chris Zimmerman, who was developing, testing,
17 and getting the Suspicious Order Monitoring System approved
18 by the DEA during this period testified that there was no
19 such requirement and explained why the distributors were
20 continuing to ship.

21 So, is it correct -- my question now, under this new
22 approved program, was AmerisourceBergen required to hold and
23 not ship? Answer, no. So, is it correct that the DEA
24 approved the 1998 program that included reporting suspicious
25 orders after shipping them? Answer, yes.

1 Question, now, why would you ship orders that were
2 suspicious? Answer, again, we reported our orders that we
3 felt were suspicious, but we would ship the -- we shipped
4 the order not to impact patient care and the supply channel.

5 This point about not disrupting the supply channel is
6 extremely important because every order that's blocked is an
7 order that isn't going to get to a patient for whom it was
8 prescribed. But, in any event, Chris Zimmerman isn't alone
9 in his position that there was not a no ship requirement.

10 Let's look at what Thomas Prevoznik from the DEA had to
11 say. Now, we saw a lot of clips from Mr. Prevoznik in Mr.
12 Farrell's closing, so I'm happy to be able to show you this
13 one.

14 Okay. Mr. Prevoznik, the DEA approved for
15 implementation nationwide a Suspicious Order Monitoring
16 System that reported suspicious orders to the DEA on a daily
17 basis after the report -- after the orders had already been
18 shipped, correct? Answer, yes.

19 Also, Your Honor may remember taking judicial notice of
20 what's been referred to as the money case in federal court
21 in Michigan where DEA officials absolutely acknowledged that
22 there was not a no-ship requirement. I'll read from just --
23 five sentences or a few sentences.

24 The opinion states, in all events, Wright, that's Kyle
25 Wright of the DEA, testified that the DEA was aware that it

1 was standard practice in the industry to file Suspicious
2 Order Reports while continuing to ship products and that
3 practice -- and that practice had been approved by the DEA.

4 Wright's supervisor, Michael Mapes, told distributors
5 that the DEA's pharmaceutical -- at the DEA's pharmaceutical
6 conference on September 11th, 2007 that the DEA's new
7 interpretation of the suspicious order regulation was that
8 distributors should suspend shipments if they routinely
9 report suspicious orders when reasonably they are destined
10 for the illicit market. Mapes informed Wright of that
11 policy interpretation, as well. And then, finally, of
12 course, that is all the regulation requires.

13 So, based on the evidence, it does not appear that
14 there was ever a basis for pursuing this theory which is so
15 directly contradicted by the record. Maybe the plaintiffs
16 have dropped it. It wasn't mentioned in Mr. Farrell's
17 closing. They should drop it, if they haven't.

18 And we can now return to the timeline where
19 AmerisourceBergen had its license in Orlando restored and
20 developed a new national program to detect and report
21 suspicious orders. Steve Mays testified about the
22 development of the new program in 2007 and his interactions
23 with the DEA. The DEA liked the program that
24 AmerisourceBergen developed so much that they decided to
25 show it off to the industry a few months later.

1 In September, 2007, Mr. Zimmerman was asked to present
2 the new program to the DEA's distributor initiative
3 conference. To this day, the DEA's website describes the
4 presentation that Mr. Zimmerman gave with Mike Mapes, then
5 Chief of the DEA's Regulatory Section, by his side.

6 And what did Mike Mapes think of AmerisourceBergen's
7 program in 2007? We asked him at his deposition. This is
8 very, very powerful testimony, I believe. I would submit.

9 After you -- after you reviewed the new changed program
10 that AmerisourceBergen had developed, you attended the
11 DEA-sponsored pharmaceutical industry conference in Houston,
12 Texas, in September of 2007. Do you recall that? Yes, I
13 do. And that was a DEA Diversion Control Division-sponsored
14 conference? It was.

15 Did you have an understanding that Chris Zimmerman was
16 asked to present at this conference because you and the DEA
17 thought that AmerisourceBergen's new system, the changed
18 system, was appropriate and would be good to share with
19 others in the industry? Yes. That was my understanding of
20 why he was asked to be part of that.

21 Do you believe -- was it your understanding that it was
22 expected by the DEA, to your understanding, to serve as a
23 new standard? It is my understanding that
24 AmerisourceBergen's system was an example of a system that
25 contained the type of information that we were looking for.

1 THE COURT: Excuse me. Go ahead.

2 MR. NICHOLAS: Question. Last question, last
3 answer. And was compliant with the Controlled Substances
4 Act? Answer, yes.

5 There is no better evidence that AmerisourceBergen's
6 program was compliant than the words of the person at the
7 DEA whose job it was to keep a sharp eye on these
8 distributors and their programs.

9 In keeping in line with that, we were asked to present
10 again in 2009 a similar presentation. Here it is.

11 In 2014, AmerisourceBergen hired David May, 30 years
12 with the DEA, to head up its Diversion Control Team. His
13 presentation to this Court of the main features of
14 AmerisourceBergen's program was unchallenged and it was
15 impressive.

16 Here are some of the things, a few of the things, that
17 Mr. May talked about in a lot more detail than this slide
18 shows: The leveraging of technological advancements to aid
19 human review. The refinement of analytics in addressing
20 customer orders. The expansion of our Diversion Control
21 Team to include investigators, pharmacists, other law
22 enforcement.

23 And to give you just one concrete example, just one of
24 what I'm talking about, you saw the dashboards during Mr.
25 Mays' -- Mr. Mays' testimony. The sole purpose of these

1 dashboards is to make sure that human reviewers have all of
2 the information they need to make good decisions.

3 These reviewers are not just stamping "approved" on
4 these orders. They're assessing a great deal of information
5 about the customer and about making decisions and they're
6 making decisions in accordance therewith.

7 The reason I'm dwelling on this, this is all due
8 diligence. That's what this is. This is diligence. And
9 the company was doing whatever it could to stay on the
10 cutting edge of technology and analytics.

11 If the plaintiffs' claim is that we don't care about
12 diversion, that does not hold water. It's clear that we've
13 gone above and beyond to advance and update our Diversion
14 Control system.

15 If they're attacking the concept of thresholds, which
16 we and all the distributors use as our method to flag
17 orders, we didn't hear that criticism from any of the
18 witnesses at trial and no one suggested another way to do
19 this. They didn't say what the threshold should be. They
20 didn't say how it should be calculated.

21 If they're attacking our use of a multiplier, which is
22 also something that all distributors use in connection with
23 setting the threshold, none of their -- none of the
24 plaintiffs' witnesses said to you the multiplier we used was
25 wrong. And none of them suggested what they thought the

1 multiplier should have been.

2 Because these are difficult, complex decisions,
3 especially with no guidance, especially with no guidance
4 from the DEA, but the DEA knew what we were using all along.
5 They signed off on it. They signed off on it in 1998. And
6 they signed off on it again in 2007.

7 They have put on no evidence that anyone other than the
8 attorneys have an issue with how we calculated thresholds or
9 the multiplier.

10 To seal off this point, there is nothing else to put on
11 this timeline. No shutdowns. No suspensions. No fines.

12 Your Honor, I can keep going, but since I think I'm the
13 only person going this afternoon, if you wouldn't mind, if
14 we could take just a five-minute break?

15 THE COURT: Yes, that would be fine. I've already
16 told Ms. Mainigi she wouldn't have to argue today.

17 MS. MAINIGI: Now, Your Honor --

18 THE COURT: So, we've got a bad time. I've done
19 some bad time management, but I'm stuck with it.

20 We'll be in recess for about ten minutes.

21 MS. MAINIGI: I appreciate you keeping the deal,
22 Your Honor.

23 (Recess taken)

24 (Proceedings resumed at 2:08 p.m. as follows:)

25 THE COURT: All right, sir, you may proceed.

1 MR. NICHOLAS: Thank you, Your Honor.

2 In the face of all of this positive and favorable
3 information about AmerisourceBergen's system and how it
4 operated in real life, the plaintiffs have mounted no actual
5 challenge. No one addressed the specifics of our program at
6 all. No one disputed a word that Mr. May, Mr. Mays, or
7 Mr. Zimmerman said. No one challenged any of their
8 recollections of meetings or events.

9 Instead, the plaintiffs limited their case on conduct
10 to their two supposed star witnesses, the expert James
11 Rafalski and the former head of Diversion Control at DEA,
12 Joseph Rannazzisi.

13 Okay. A few observations about the testimony of Mr.
14 Rafalski. I am not really going to talk about the fatal
15 infirmities with his supposed methodology. That has been
16 well briefed to Your Honor. And I know you're still
17 considering those issues and consider -- in connection with
18 the *Daubert* motion, *Daubert* challenge. But I will say this
19 much.

20 This expert looked at you and everyone with a straight
21 face and he testified that these distributors should have
22 blocked 90 percent of the opioid medications to Cabell and
23 Huntington during all of the years in issue. That was
24 outrageous and it was preposterous.

25 It was outrageous because it would have had the absurd

1 and heartless effect of depriving almost everyone in the
2 county and in the city from medicine to treat their pain as
3 prescribed by doctors.

4 It was preposterous because it assumed that almost all
5 of the doctors in the county and in the city didn't know
6 what they were doing or had bad intentions.

7 Mr. Rafalski should be afforded no credibility. His
8 testimony should be disregarded. And the fact that the
9 plaintiffs plowed ahead with his testimony, testimony of
10 that nature undermines their credibility.

11 Consider what the plaintiffs promised as to how Mr.
12 Rafalski was going to prove out their case and then compare
13 it to what he did and did not do.

14 Recall Mr. Farrell's promise because it was, it was
15 colorful. He made a huge deal about how he was going to do
16 it. He said that Mr. Rafalski was going to develop and
17 present what he called a case file -- those were his words,
18 Mr. Farrell's words -- that would catalogue
19 AmerisourceBergen's conduct, a case file that he would bring
20 to Your Honor and give to you proverbially, and that he was
21 going to march that case file into court and show it to you,
22 a case file about our failings.

23 Well, where was the case file? As to
24 AmerisourceBergen's customers in Cabell County and the City
25 of Huntington, he did not mention a single one. And he

1 admitted that he offers no opinions about whether diversion
2 occurred at the pharmacy level, no opinions.

3 As to the thresholds used by AmerisourceBergen to flag
4 potential suspicious orders, he testified that there is not
5 one, quote, particular golden rule on what the trigger
6 should be, unquote, but then proceeded to flag an
7 astronomical percentage of the orders that AmerisourceBergen
8 shipped into Cabell and Huntington.

9 Yet, he did not even look at the orders he flagged or
10 that he was challenging, not even the initial order that
11 triggered the thousands of orders that followed. He
12 couldn't be bothered to look at it or testify about it.

13 As to the one thing that he did offer an opinion on,
14 the one thing, due diligence, he simply offered a completely
15 empty conclusion without identifying the tiniest sliver, the
16 tiniest morsel of evidence about it.

17 This was their big moment. Okay? This was their --
18 this was what they were building to. After all of the
19 build-up about Mr. Rafalski, there was this key question by
20 Mr. Farrell to Mr. Rafalski about due diligence:

21 Question: "And have you gone through the customer
22 files and the documents produced by AmerisourceBergen,
23 McKesson, and Cardinal Health?"

24 "I have, Your Honor."

25 "And have you found sufficient evidence in this

1 record -- in the record to dispel the suspicion of any of
2 these orders that, that were or should have been flagged?"

3 "I have not, Your Honor."

4 And that, that was the sum total of Mr. Rafalski's
5 discussion of due diligence. That is the case file that he
6 came in here with. That's it. That is it.

7 Now, here's what he did not come in with. He didn't
8 come in with testimony about what AmerisourceBergen's due
9 diligence files contained. He didn't come here with
10 criticisms of any shortcomings, examples of things that were
11 missing.

12 How much in the files themselves? He said he reviewed
13 them. But he didn't tell you a single thing that was wrong
14 with AmerisourceBergen's due diligence.

15 So that was Mr. Rafalski, one of two star witnesses for
16 the plaintiffs.

17 And the other star witness was Mr. Rannazzisi, Joseph
18 Rannazzisi, the former head of Diversion Control for the
19 DEA.

20 He actually wound up testifying quite favorably about
21 AmerisourceBergen. He corroborated our evidence. And he
22 was actually careful not to criticize us.

23 For example, he acknowledged that he was briefed on the
24 fact that AmerisourceBergen took actions after the 2005
25 distributor initiative.

1 Question: "And, so, can you agree with me that
2 AmerisourceBergen took affirmative steps in line with DEA's
3 suggestions coming out of that meeting?"

4 Answer: "I was told that you had altered or changed or
5 modified how you were looking at suspicious orders, yes."

6 He confirmed we never paid a fine.

7 "In fact, to your knowledge, AmerisourceBergen has
8 never paid a fine to the DEA; is that correct?"

9 Answer: "As far as I know, we've never had a fine from
10 AmerisourceBergen."

11 And he confirmed that there were no subsequent
12 enforcement actions after the Orlando settlement in 2007.

13 "Mr. Rannazzisi, did DEA bring additional actions
14 against AmerisourceBergen during your tenure as Deputy
15 Assistant Administrator?"

16 "I don't recall any additional actions against
17 AmerisourceBergen."

18 So the two witnesses that plaintiffs said would
19 establish unreasonable conduct on the part of
20 AmerisourceBergen did not.

21 And as we return at last to the regulation and the
22 supply -- and, and we consider the supply chain and the
23 history and we take stock, here is what we see: Compliance
24 with the CSA.

25 So what is left of Ameri -- so let me, let me take a

1 beat here.

2 What is left of plaintiffs' case? Volume. It's
3 volume. But there is a perfectly rational explanation as
4 told almost entirely during this trial, during this trial
5 through the plaintiffs' own experts.

6 The plaintiffs' six-week presentation of evidence
7 boiled down to this one thing: Volume. All that they have
8 done is to suggest that the -- is to suggest that the number
9 of opioid pills shipped to Cabell and Huntington was too
10 high.

11 They basically asked you to draw an inference that the
12 distributors should have known this and in some ill-defined
13 way, they should have shipped fewer pills.

14 Why the distributors should have been expected to
15 conclude this based on bulk orders they were receiving from
16 licensed pharmacies who were filling lawful prescriptions is
17 left unexplained.

18 And how distributors could have responsibly cut their
19 shipment down without -- their shipments down without
20 disrupting the doctor/patient relationship, the role of the
21 pharmacy, or the supply chain overall is unexplained.

22 Remember, distributors don't see individual
23 prescriptions. They don't see -- they don't see patient
24 information. They don't communicate with doctors. They're
25 shipping orders in bulk. They're shipping orders in bulk.

1 If they were to cut off supply, a random subset, a
2 random subset of patients with opioid prescriptions that
3 were written by well-intentioned doctors would not get their
4 medicine. Patients on Hospice, patients with cancer,
5 patients with debilitating pain, those are examples of
6 people who may not get their medicine -- who wouldn't get
7 their medicine. This just makes no sense.

8 Besides, volume has been well explained in this trial
9 by many, many witnesses, including the plaintiffs'
10 witnesses.

11 First, prescribing drove volume. If there is one thing
12 in this case that pretty much every witness from both sides
13 has said and agreed upon by now, it is that the distributors
14 didn't determine volume. Doctors determined volume.

15 Second, there are clear identifiable reasons why
16 prescribing increased. We're not one of them. There is an
17 overwhelming amount of evidence from this trial about the
18 increase in prescribing of opioids in Cabell County and the
19 City of Huntington, as well as in West Virginia, and as well
20 as in the United States.

21 And the reasons for this are no secret and have been
22 extensively addressed by a number of experts, as well as
23 most other witnesses. The standard of care for the
24 treatment of pain changed over time.

25 That is why, that is why witness after witness has told

1 you that 99 and a half percent of these doctors were
2 prescribing in good faith. They were following the standard
3 of care. And here are all of the plaintiffs' witnesses who
4 told you that.

5 Third, the plaintiffs' data experts drove these points
6 home. They drove them home. Plainly, the change in the
7 standard of care increased opioid prescribing which in turn
8 increased opioid distribution.

9 The plaintiffs have harped on the fact that the average
10 distribution of opioids in Cabell and Huntington was higher
11 than the West Virginia and national average. That's solely
12 because prescribing was higher in the state -- was higher
13 than the state and higher than the national average.

14 Start with -- so let's just look at the data and let's
15 look at what their witnesses say. Start with the trends.
16 Okay?

17 Plaintiffs' expert Lacey Keller looked at prescribing
18 in Cabell/Huntington. And their expert, Dr. McCann, looked
19 at distribution in Cabell/Huntington. And the trends
20 matched.

21 Question: "So the chart that shows prescriptions and
22 the chart that shows distributions generally follow the same
23 pattern; correct?"

24 "Yes."

25 And then check out this quote:

1 Question: "Okay. And the fact that prescribing in
2 Cabell County peaked in 2009 is entirely consistent with
3 your countless opinions that distribution peaked in 2009;
4 correct?"

5 "Correct. That's what I say. They're two sides of the
6 same coin."

7 Now go to the numbers. Down to the person, the numbers
8 matched.

9 "Now, do you have any quarrel, Ms. Keller, with the
10 observation that your per capita prescription analysis and
11 Dr. McCann's per capita distribution analysis come within
12 one pill of each other over this nine-year period?"

13 "That's what the math is, yeah."

14 Question: "That's what the math shows. So the IQVIA
15 prescription data and the ARCOS distribution data get us to
16 the same place; correct?"

17 Answer: "Again, they're two different sides of -- one
18 is shipments and one is prescriptions, but they -- for that
19 time period, we both arrive at about the same number of
20 pills per person."

21 She's understating it when she says "about," "about the
22 same number."

23 They -- it is actually amazing when you think about it.
24 These two experts worked separately with two different
25 datasets. One looked at prescribing and one looked at

1 distribution and they arrived at the exact same number.

2 Prescribing equaled volume. It was the same thing.

3 There was no denying this, and no one denied it. And
4 there was no other explanation for the increase in
5 distribution other than increased prescribing.

6 What also came clear from the evidence is that the
7 plaintiffs did not and could not demonstrate over-supply.
8 Over-supply would mean our distribution exceeded
9 prescriptions, but that didn't happen.

10 And plaintiffs never said how many pills we should have
11 shipped. They've not even tried to approximate the number.
12 Have they offered any evidence, for example, that we should
13 have shipped 10 percent fewer pills? That we should have
14 shipped 20 percent fewer pills? No, they have not because
15 they can't. They can't.

16 They know perfectly well -- they know that behind each
17 pill was a prescription written by a doctor in this
18 community based on the doctor's medical judgment that
19 neither the plaintiffs nor -- neither the plaintiffs'
20 lawyers nor their experts were going to challenge. They
21 just weren't. And they didn't.

22 The last point about volume is this. Distributors
23 should not second-guess prescribers. It's dangerous to do
24 that. The consequences of doing so are dangerous. It is
25 not the distributors' role to second-guess doctors.

1 Question to Mr. Rannazzisi -- to Mr. Rafalski:
2 "There's no determination -- no requirement in the
3 regulations that distributors have to affirmatively
4 determine that prescribing decisions are legitimate, is
5 there?"

6 Answer: "I'd agree with that."

7 Question to Mr. Rannazzisi: "And a distributor cannot
8 make the determination if a controlled substance is
9 medically necessary for a particular patient; correct?"

10 Answer: "Yes. And we've never asked a distributor to
11 do that."

12 There are real patient access risks in arbitrarily
13 cutting supply. Here's what Mr. Rafalski said:

14 "Okay." Question to him: "Okay. If you impose
15 arbitrary limits, you might impact diversion, but you might
16 also keep it from people who need it; correct?"

17 Answer: "That's, that's my point, yes, sir."

18 Question: "That would be a concern for the
19 distributors too. If they arbitrarily imposed limits on
20 prescription opioids, that could also prescribe [sic]
21 medication from people who needed it. True?"

22 And then, "Is what I said true?"

23 Answer: "Yeah, it's true."

24 This next quote, this one I want to -- I need to dwell
25 on just for a minute.

1 "So, Mr. Rannazzisi --"

2 He was being questioned about the quota.

3 "So, Mr. Rannazzisi, as the opioid epidemic and opioid
4 diversion grew, why didn't DEA lower quota?"

5 Answer: "You can't just lower quota. It, it doesn't
6 work that way. And I know people have said this over and
7 over again. Quota -- it's a scientific and mathematical
8 exercise to ensure that there's enough drug in the system.
9 I always think of it this way. If you have 100 people and
10 all of those people are trying to get oxycodone and some of
11 them are, are drug-seekers who shouldn't have it and some of
12 them are legitimate patients that need it, maybe they're in
13 palliative care, maybe they're chronic pain, but they need
14 that drug, the quota is established so they will get the
15 drug. But if I come in and say, you know what, I'm just
16 going to cut it by 20 percent, then that's 20 percent less
17 but that patient, the patient population and those
18 drug-seekers are competing for now 20 percent less. And
19 that's how shortages occur."

20 "And you had --"

21 Question: "And you had the concern that if you
22 arbitrarily cut the level of the quota, that could have
23 negative consequences for real-life patients; correct?"

24 Answer: "Yes, that's correct."

25 Now, I do need to take a beat here and let the irony of

1 this statement by Mr. Rannazzisi sink in.

2 This may be the most frustrating testimony in the
3 entire case because, because this is a perfect statement of
4 our position as well, and it's what we've been saying all
5 along.

6 If we arbitrarily limit the supply, people who need
7 their medication will not receive it. They will be without
8 it. We have to be very careful when blocking shipments
9 because we have no way of knowing or controlling who would
10 have access to the limited supply and who would be left
11 empty-handed.

12 Those are the exact same things that Mr. Rannazzisi is
13 saying here in this statement. And the reason we're so
14 frustrated is because it's perfectly fine when Mr.
15 Rannazzisi explains this to justify why he continued to
16 raise the quota in the midst of the opioid crisis, yet the
17 plaintiffs are unwilling to apply that exact same logic to
18 the position we're in.

19 The plaintiffs want to rely on this erroneous
20 over-simplification that the way to lower volume is to
21 simply not ship opioids in spite of the fact that they're
22 being shipped in response to legal, legitimate orders.

23 To borrow the words of Mr. Rannazzisi, it doesn't work
24 that way. It doesn't work that way.

25 Even assuming that the plaintiffs proved unreasonable

1 conduct, they still have to prove that the unreasonable
2 conduct was a direct cause of the harm. They did not do so.
3 They did not prove proximate cause.

4 I want to go back to the supply chain to show you just
5 how far removed AmerisourceBergen is from the alleged harm,
6 and also to highlight how many significant intervening
7 causes exist between the unproven, unreasonable conduct and
8 the alleged harm.

9 AmerisourceBergen is here. Once AmerisourceBergen
10 distributes the medication to its customers, it has no
11 visibility. There's the customers, pharmacy, hospital and
12 so forth. It has no visibility as to what happens after
13 that point.

14 And, most importantly, it never knows the identity,
15 medical condition, or medical history of the patient. The
16 alleged harm that we're talking about is over -- way over
17 here.

18 Now, we discussed this already, but it is worth
19 repeating now. The plaintiffs did not prove diversion at
20 any point between AmerisourceBergen and its customers, nor
21 did they prove diversion at the pharmacy level.

22 The plaintiffs focus entirely on downstream diversion.
23 There's just no causation here and there are countless
24 intervening causes.

25 First and foremost, there is -- fundamentally, okay,

1 there's the prescribing relationship between the individual
2 doctor and the individual patient.

3 We had no role into that. We have no insight into
4 that. We have no sight line there. We're not in a position
5 to second-guess the decision made by that doctor for that
6 patient. And it was not our responsibility to do so. We
7 also played no role in influencing whether the doctor would
8 prescribe an opioid.

9 Others clearly did; the Joint Commission, the West
10 Virginia Board of Medicine, Purdue Pharma. In fact, it's
11 the plaintiffs themselves, the plaintiffs who blame the
12 Joint Commission. It's the plaintiffs who blame Purdue.

13 Even if we were to stop right here, there's no
14 proximate cause. But to get to the harm alleged here, the
15 plaintiffs had to prove a lot more because the alleged harm
16 is not at the patient level. It's way out here. It's very
17 downstream.

18 And when we talk about downstream diversion, this is
19 what it is. It's medicine cabinet diversion which, which
20 accounts for the overwhelming source of diverted opioids.
21 It's drug trafficking organizations from Detroit, Akron,
22 Columbus. It's heroin and fentanyl originating from Mexico,
23 from China.

24 All of these things are illegal acts, including the
25 medicine cabinet diversion, quite honestly. All of these

1 things are illegal acts. Diversion by definition is illegal
2 conduct. Illegal acts break the causal change. And
3 AmerisourceBergen should not be financially responsible for
4 harm it did not cause.

5 The bridge is too far, way too far to try and connect
6 AmerisourceBergen to the alleged harm. They didn't prove
7 direct proximate cause.

8 Now, the last thing I want to talk about, Your Honor,
9 and I'm going to do it briefly, is abatement.

10 I never, I never like talking about damages in a case
11 where I don't think there's any liability. And for that
12 reason, I'm, I'm reluctant to talk about it here. But I'm
13 going to say a few words.

14 First of all, the plaintiffs have framed this as if
15 it's a public nuisance case where they are seeking equitable
16 relief in the form of abatement. But let's be super clear
17 about this. They want a check. They're asking for a check.

18 And I'd say that they're asking for a blank check, but
19 that's not technically true. They're asking for a check for
20 two and a half -- \$2.5 billion which might as well be a
21 blank check.

22 And Dr. Alexander didn't bother to tell us what it is
23 that the plaintiffs would actually do with the money, did
24 he. He didn't.

25 First, Dr. Alexander's abatement plan does not suggest

1 a single change to the way AmerisourceBergen does business,
2 to its diversion control efforts, to its Suspicious Order
3 Monitoring Program System, to its compliance practice, or to
4 anything else. His recommendations have nothing to do with
5 distributors' activities.

6 Second, Dr. Alexander is asking for a check for two and
7 a half billion dollars to address the needs of a specific
8 city and a specific county where he couldn't be bothered to
9 take into account the programs that Huntington and Cabell
10 already have in place. Programs -- good programs have been
11 in place for years and we have heard ample testimony about
12 these programs.

13 He did no analysis of budgets or staffing. He did no
14 analysis of occupancy rates and the wait list for admission.
15 He did no analysis of the number of people served on a
16 yearly basis. He did zero analysis of the impact of these
17 programs on the city and county budgets. And he did no
18 analysis of the existing and likely funding sources for
19 these programs.

20 I mean, it's unclear why those things aren't reflected
21 in his plan. He did mention some of them, so we know he was
22 aware of them.

23 One might conclude -- one might conclude that it's
24 inconvenient for purposes of this lawsuit that Huntington
25 and Cabell have well-constructed programs that are working,

1 even though in real life that's obviously a good, a really
2 good thing.

3 And, finally, just as a reminder, but a reminder of
4 something significant, the city and the county don't pay for
5 the things that they are requesting in their abatement plan.
6 And on top of that, they're operating at a surplus of
7 millions of dollars.

8 We respect what Huntington and Cabell have accomplished
9 in dealing with this crisis. But it is not equitable relief
10 for these plaintiffs to be handed a check for two and a half
11 billion dollars for services that they don't pay for.

12 Your Honor, I feel like I've been talking for a pretty
13 long time. And I know you're going to hear from the other
14 defendants as well.

15 I do want to say this to the Court. This case could
16 not be more important to AmerisourceBergen. We hope that in
17 this courtroom we have been able to convey how strongly we
18 feel and believe that we are not liable. And we look
19 forward to your decision. And we appreciate your
20 consideration.

21 Thank you very much, Your Honor.

22 THE COURT: Thank you, Mr. Nicholas.

23 Well, I guess we'll come back at 9:00 in the morning
24 and we'll hear from the other two defendants. And then
25 we'll hear -- we'll take a break for lunch and hear from the

1 plaintiffs in rebuttal. See you then.

2 (Trial recessed at 2:40 p.m.)

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1 CERTIFICATION:

2 I, Ayme A. Cochran, Official Court
3 Reporter, and I, Lisa A. Cook, Official Court Reporter,
4 certify that the foregoing is a correct transcript from
5 the record of proceedings in the matter of The City of
6 Huntington, et al., Plaintiffs vs. AmerisourceBergen
7 Drug Corporation, et al., Defendants, Civil Action No.
8 3:17-cv-01362 and Civil Action No. 3:17-cv-01665, as
9 reported on July 27, 2021.

10
11 S\Ayme A. Cochran

12 Reporter

13 s\Lisa A. Cook

14 Reporter

15 —

16 July 27, 2021.
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